UNITED STATES

REPORTS

554

OCT. TERM 2007

UNITED STATES REPORTS

VOLUME 554

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2007

JUNE 16 THROUGH OCTOBER 3, 2008

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 2013

Printed on Uncoated Permanent Printing Paper

For sale by the Superintendent of Documents, U.S. Government Printing Office

ERRATUM

485 U. S., at 226, note, last line: "United States" should be "Securities and Exchange Commission".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.

RETIRED

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 1, 2006, viz.:

For the District of Columbia Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, SAMUEL A. ALITO, JR., Associate Justice.

For the Ninth Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

For the Federal Circuit, JOHN G. ROBERTS, JR., Chief Justice.

February 1, 2006.

(For next previous allotment, see 546 U. S., p. V.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2007

DADA *v.* MUKASEY, ATTORNEY GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06–1181. Argued January 7, 2008—Decided June 16, 2008

Petitioner, a native and citizen of Nigeria, alleges that he married an American citizen in 1999. His wife filed an I–130 Petition for Alien Relative on his behalf that was denied in 2003. The Department of Homeland Security (DHS) charged Dada with being removable under the Immigration and Nationality Act for overstaying his temporary non-immigrant visa. The Immigration Judge (IJ) denied the request for a continuance pending adjudication of a second I–130 petition, found Dada eligible for removal, and granted his request for voluntary departure under 8 U. S. C. § 1229c(b). The Board of Immigration Appeals (BIA) affirmed and ordered Dada to depart within 30 days or suffer statutory penalties. Two days before the end of the 30-day period, Dada sought to withdraw his voluntary departure request and filed a motion to reopen removal proceedings under § 1229a(c)(7), contending that new and material evidence demonstrated a bona fide marriage and that his case should be continued until resolution of the second I–130 petition. After the voluntary departure period had expired, the BIA denied the request, reasoning that an alien who has been granted voluntary departure but does not depart in a timely fashion is statutorily barred from receiving adjustment of status. It did not consider Dada's request to withdraw his voluntary departure request. The Fifth Circuit affirmed.

Syllabus

Held: An alien must be permitted an opportunity to withdraw a motion for voluntary departure, provided the request is made before expiration of the departure period. Pp. 8–22.

(a) Resolution of this case turns on the interaction of two aspects of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996—the alien's right to file a motion to reopen in removal proceedings and the rules governing voluntary departure. Pp. 8–15.

(1) Voluntary departure is discretionary relief that allows certain favored aliens to leave the country willingly. It benefits the Government by, *e. g.*, expediting the departure process and avoiding deportation expenses, and benefits the alien by, *e. g.*, facilitating readmission. To receive these benefits, the alien must depart timely. As relevant here, when voluntary departure is requested at the conclusion of removal proceedings, the departure period may not exceed 60 days. 8 U. S. C. § 1229c(b)(2). Pp. 8–12.

(2) An alien is permitted to file one motion to reopen, § 1229a(c)(7)(A), asking the BIA to change its decision because of newly discovered evidence or changed circumstances. The motion generally must be filed within 90 days of a final administrative removal order, § 1229a(c)(7)(C)(i). Although neither the text of § 1229c or § 1229a(c)(7) nor the applicable legislative history indicates whether Congress intended that an alien granted voluntary departure be permitted to pursue a motion to reopen, the statutory text plainly guarantees to each alien the right to file "one motion to reopen proceedings under this section," § 1229a(c)(7)(A). Pp. 12–15.

(b) Section 1229c(b)(2) unambiguously states that the voluntary departure period "shall not be valid" for more than "60 days," but says nothing about the motion to reopen; and nothing in the statutes or past usage indicates that voluntary departure or motions to reopen cannot coexist. In reading a statute, the Court must not "look merely to a particular clause," but consider "in connection with it the whole statute." *Kokoszka* v. *Belford*, 417 U. S. 642, 650. Reading the Act as a whole, and considering the statutory scheme governing voluntary departure alongside § 1229a(c)(7)(A)'s right to pursue "one motion to reopen," the Government's position that an alien who has agreed to voluntarily depart is not entitled to pursue a motion to reopen is unsustainable. It would render the statutory reopening right a nullity in most voluntary departure cases since it is foreseeable, and quite likely, that the voluntary departure time will expire long before the BIA decides a timely filed motion to reopen. Absent tolling or some other remedial action by this Court, then, the alien who is granted voluntary departure but whose circumstances have changed in a manner cognizable by a motion to reopen is between Scylla and Charybdis: The alien

either may leave the United States in accordance with the voluntary departure order, with the effect that the motion to reopen is deemed withdrawn, or may stay in the United States to pursue the case's reopening, risking expiration of the departure period and ineligibility for adjustment of status, the underlying relief sought. Because a motion to reopen is meant to ensure a proper and lawful disposition, this Court is reluctant to assume that the voluntary departure statute is designed to make reopening unavailable for the distinct class of deportable aliens most favored by the same law, when the statute's plain text reveals no such limitation. Pp. 15–19.

(c) It is thus necessary to read the Act to preserve the alien's right to pursue reopening while respecting the Government's interest in the voluntary departure arrangement's *quid pro quo*. There is no statutory authority for petitioner's proposal to automatically toll the voluntary departure period during the motion to reopen's pendency. Voluntary departure is an agreed-upon exchange of benefits, much like a settlement agreement. An alien who is permitted to stay past the departure date to wait out the motion to reopen's adjudication cannot then demand the full benefits of voluntary departure, for the Government's benefit—a prompt and costless departure—would be lost. It would also invite abuse by aliens who wish to stay in the country but whose cases are unlikely to be reopened. Absent a valid regulation otherwise, the appropriate way to reconcile the voluntary departure and motion to reopen provisions is to allow an alien to withdraw from the voluntary departure agreement. The Department of Justice, which has authority to adopt the relevant regulations, has made a preliminary determination that the Act permits an alien to withdraw a voluntary departure application before expiration of the departure period. Although not binding in the present case, this proposed interpretation "warrants respectful consideration." *Wisconsin Dept. of Health and Family Servs.* v. *Blumer*, 534 U. S. 473, 497. To safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before the departure period expires, without regard to the motion to reopen's underlying merits. The alien has the option either to abide by the voluntary departure's terms, and receive its agreed-upon benefits; or, alternatively, to forgo those benefits and remain in the country to pursue an administrative motion. An alien selecting the latter option gives up the possibility of readmission and becomes subject to the IJ's alternative order of removal. The alien may be removed by the DHS within 90 days, even if the motion to reopen has yet to be adjudicated. But the alien may request a stay of the removal order, and, though the BIA has discretion to deny a motion for a stay based on the merits of the motion to reopen,

it may constitute an abuse of discretion for the BIA to deny a motion for stay where the motion states nonfrivolous grounds for reopening. Though this interpretation still confronts the alien with a hard choice, it avoids both the quixotic results of the Government's proposal and the elimination of benefits to the Government that would follow from petitioner's tolling rule. Pp. 19–22.

207 Fed. Appx. 425, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 23. ALITO, J., filed a dissenting opinion, *post*, p. 31.

Christopher J. Meade argued the cause for petitioner. With him on the briefs were *Seth P. Waxman* and *Raed Gonzalez*.

Deputy Solicitor General Kneedler argued the cause for respondent. With him on the brief were former *Solicitor General Clement*, *Acting Assistant Attorney General Bucholtz*, *Deputy Assistant Attorney General Dupree*, *Toby J. Heytens*, *Donald E. Keener*, and *Quynh Bain*.*

JUSTICE KENNEDY delivered the opinion of the Court.

We decide in this case whether an alien who has requested and been granted voluntary departure from the United States, a form of discretionary relief that avoids certain statutory penalties, must adhere to that election and depart within the time prescribed, even if doing so causes the alien to forgo a ruling on a pending, unresolved motion to reopen the removal proceedings. The case turns upon the interaction of relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546 (IIRIRA or Act). The Act provides that every alien ordered removed from the United States has a right to file

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*Briefs of *amici curiae* urging reversal were filed for the American Immigration Law Foundation et al. by *Nadine Wettstein* and *Beth Werlin*; and for Adil Chedad by *David C. Frederick*, *Michael F. Sturley*, and *Saher Joseph Macarius*.

one motion to reopen his or her removal proceedings. See 8 U. S. C. § 1229a(c)(7) (2000 ed., Supp. V). The statute also provides, however, that if the alien's request for voluntary departure is granted after he or she is found removable, the alien is required to depart within the period prescribed by immigration officials, which cannot exceed 60 days. See § 1229c(b)(2) (2000 ed.). Failure to depart within the prescribed period renders the alien ineligible for certain forms of relief, including adjustment of status, for a period of 10 years. § 1229c(d)(1) (2000 ed., Supp. V). Pursuant to regulation, however, departure has the effect of withdrawing the motion to reopen. See 8 CFR § 1003.2(d) (2007).

Without some means, consistent with the Act, to reconcile the two commands—one directing voluntary departure and the other directing termination of the motion to reopen if an alien departs the United States—an alien who seeks reopening has two poor choices: The alien can remain in the United States to ensure the motion to reopen remains pending, while incurring statutory penalties for overstaying the voluntary departure date; or the alien can avoid penalties by prompt departure but abandon the motion to reopen.

The issue is whether Congress intended the statutory right to reopen to be qualified by the voluntary departure process. The alien, who is petitioner here, urges that filing a motion to reopen tolls the voluntary departure period pending the motion's disposition. We reject this interpretation because it would reconfigure the voluntary departure scheme in a manner inconsistent with the statutory design. We do not have the authority to interpret the statute as petitioner suggests. Still, the conflict between the right to file a motion to reopen and the provision requiring voluntary departure no later than 60 days remains untenable if these are the only two choices available to the alien. Absent a valid regulation resolving the dilemma in a different way, we conclude the alien must be permitted an opportunity to withdraw the motion for voluntary departure, provided the

request is made before the departure period expires. Petitioner attempted to avail himself of this opportunity below. The Court of Appeals for the Fifth Circuit did not disturb the Board of Immigration Appeals' (BIA or Board) denial of petitioner's request to withdraw the voluntary departure election. We now reverse its decision and remand the case.

I

Petitioner Samson Taiwo Dada, a native and citizen of Nigeria, came to the United States in April 1998 on a temporary nonimmigrant visa. He overstayed it. In 1999, petitioner alleges, he married an American citizen. Petitioner's wife filed an I–130 Petition for Alien Relative on his behalf. The necessary documentary evidence was not provided, however, and the petition was denied in February 2003.

In 2004, the Department of Homeland Security (DHS) charged petitioner with being removable under § 237(a)(1)(B) of the Immigration and Nationality Act (INA), as redesignated by IIRIRA § 305(a)(2), 110 Stat. 3009–598, and as amended, 8 U. S. C. § 1227(a)(1)(B) (2000 ed., Supp. V), for overstaying his visa. Petitioner's wife then filed a second I–130 petition. The Immigration Judge (IJ) denied petitioner's request for a continuance pending adjudication of the newly filed I–130 petition and noted that those petitions take an average of about three years to process. The IJ found petitioner to be removable but granted the request for voluntary departure under § 1229c(b) (2000 ed.). The BIA affirmed on November 4, 2005, without a written opinion. It ordered petitioner to depart within 30 days or suffer statutory penalties, including a civil fine of not less than $1,000 and not more than $5,000 and ineligibility for relief under §§ 240A, 240B, 245, 248, and 249 of the INA for a period of 10 years. See App. to Pet. for Cert. 5–6.

Two days before expiration of the 30-day period, on December 2, 2005, petitioner sought to withdraw his request for voluntary departure. At the same time he filed with the

BIA a motion to reopen removal proceedings under 8 U. S. C. § 1229a(c)(7) (2000 ed., Supp. V). He contended that his motion recited new and material evidence demonstrating a bona fide marriage and that his case should be continued until the second I–130 petition was resolved.

On February 8, 2006, more than two months after the voluntary departure period expired, the BIA denied the motion to reopen on the ground that petitioner had overstayed his voluntary departure period. Under § 240B(d) of the INA, 8 U. S. C. § 1229c(d) (2000 ed. and Supp. V), the BIA reasoned, an alien who has been granted voluntary departure but fails to depart in a timely fashion is statutorily barred from applying for and receiving certain forms of discretionary relief, including adjustment of status. See App. to Pet. for Cert. 3–4. The BIA did not address petitioner's motion to withdraw his request for voluntary departure.

The Court of Appeals for the Fifth Circuit affirmed. *Dada* v. *Gonzales*, 207 Fed. Appx. 425 (2006) *(per curiam)*. Relying on its decision in *Banda-Ortiz* v. *Gonzales*, 445 F. 3d 387 (2006), the court held that the BIA's reading of the applicable statutes as rendering petitioner ineligible for relief was reasonable. The Fifth Circuit joined the First and Fourth Circuits in concluding that there is no automatic tolling of the voluntary departure period. See *Chedad* v. *Gonzales*, 497 F. 3d 57 (CA1 2007); *Dekoladenu* v. *Gonzales*, 459 F. 3d 500 (CA4 2006). Four other Courts of Appeals have reached the opposite conclusion. See, *e. g.*, *Kanivets* v. *Gonzales*, 424 F. 3d 330 (CA3 2005); *Sidikhouya* v. *Gonzales*, 407 F. 3d 950 (CA8 2005); *Azarte* v. *Ashcroft*, 394 F. 3d 1278 (CA9 2005); *Ugokwe* v. *United States Atty. Gen.*, 453 F. 3d 1325 (CA11 2006).

We granted certiorari, see *Dada* v. *Keisler*, 551 U. S. 1188 (2007), to resolve the disagreement among the Courts of Appeals. After oral argument we ordered supplemental briefing, see 552 U. S. 1138 (2008), to address whether an alien may withdraw his request for voluntary departure be-

fore expiration of the departure period. Also after oral argument, on January 10, 2008, petitioner's second I–130 application was denied by the IJ on the ground that his marriage is a sham, contracted solely to obtain immigration benefits.

II

Resolution of the questions presented turns on the interaction of two statutory schemes—the statutory right to file a motion to reopen in removal proceedings and the rules governing voluntary departure.

A

Voluntary departure is a discretionary form of relief that allows certain favored aliens—either before the conclusion of removal proceedings or after being found deportable—to leave the country willingly. Between 1927 and 2005, over 42 million aliens were granted voluntary departure; almost 13 million of those departures occurred between 1996 and 2005 alone. See Dept. of Homeland Security, Aliens Expelled: Fiscal Years 1892 to 2005, Table 38 (2005), online at http://www.dhs.gov/ximgtn/statistics/publications/YrBk05En.shtm (all Internet materials as visited June 13, 2008, and available in Clerk of Court's case file).

Voluntary departure was "originally developed by administrative officers, in the absence of a specific mandate in the statute." 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 74.02[1], p. 74–15 (rev. ed. 2007) (hereinafter Gordon). The practice was first codified in the Alien Registration Act of 1940, § 20, 54 Stat. 671. The Alien Registration Act amended § 19 of the Immigration Act of Feb. 5, 1917, 39 Stat. 889, to provide that an alien "deportable under any law of the United States and who has proved good moral character for the preceding five years" may be permitted by the Attorney General to "depart the United States to any country of his choice at his own expense, in lieu of deportation." § 20(c), 54 Stat. 672.

In 1996, perhaps in response to criticism of immigration officials who had expressed frustration that aliens granted voluntary departure were "permitted to continue their illegal presence in the United States for months, and even years," Letter from Benjamin G. Habberton, Acting Commissioner on Immigration and Naturalization, to the Executive Director of the President's Commission on Immigration and Naturalization, reprinted in Hearings before the House Committee on the Judiciary, 82d Cong., 2d Sess., 1954 (Comm. Print 1952), Congress curtailed the period of time during which an alien may remain in the United States pending voluntary departure. The Act, as pertinent to voluntary departures requested at the conclusion of removal proceedings, provides:

> "The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—
>
> "(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;
>
> "(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;
>
> "(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and
>
> "(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so." 8 U. S. C. § 1229c(b)(1).

See also § 1229c(a)(1) ("The Attorney General may permit an alien voluntarily to depart the United States at the alien's

own expense under this subsection" in lieu of being subject to removal proceedings or prior to the completion of those proceedings; the alien need not meet the requirements of § 1229c(b)(1) if removability is conceded).

When voluntary departure is requested at the conclusion of removal proceedings, as it was in this case, the statute provides a voluntary departure period of not more than 60 days. See § 1229c(b)(2). The alien can receive up to 120 days if he or she concedes removability and requests voluntary departure before or during removal proceedings. See § 1229c(a)(2)(A). Appropriate immigration authorities may extend the time to depart but only if the voluntary departure period is less than the statutory maximum in the first instance. The voluntary departure period in no event may exceed 60 or 120 days for §§ 1229c(b) and 1229c(a) departures, respectively. See 8 CFR § 1240.26(f) (2007) ("Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. . . . In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act").

The voluntary departure period typically does not begin to run until administrative appeals are concluded. See 8 U. S. C. § 1101(47)(B) ("The order . . . shall become final upon the earlier of—(i) a determination by the [BIA] affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the [BIA]"); § 1229c(b)(1) (Attorney General may permit voluntary departure at conclusion of removal proceedings); see also 8 CFR § 1003.6(a) (2007) ("[T]he decision in any proceeding . . . from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal . . . "). In addition some Federal Courts of Appeals have found that they may stay voluntary departure

pending consideration of a petition for review on the merits. See, *e. g.*, *Thapa* v. *Gonzales*, 460 F. 3d 323, 329–332 (CA2 2006); *Obale* v. *Attorney General of United States*, 453 F. 3d 151, 155–157 (CA3 2006). But see *Ngarurih* v. *Ashcroft*, 371 F. 3d 182, 194 (CA4 2004). This issue is not presented here, however, and we leave its resolution for another day.

Voluntary departure, under the current structure, allows the Government and the alien to agree upon a *quid pro quo*. From the Government's standpoint, the alien's agreement to leave voluntarily expedites the departure process and avoids the expense of deportation—including procuring necessary documents and detaining the alien pending deportation. The Government also eliminates some of the costs and burdens associated with litigation over the departure. With the apparent purpose of ensuring that the Government attains the benefits it seeks, the Act imposes limits on the time for voluntary departure, see *supra*, at 10, and prohibits judicial review of voluntary departure decisions, see 8 U. S. C. §§ 1229c(f) and 1252(a)(2)(B)(i).

Benefits to the alien from voluntary departure are evident as well. He or she avoids extended detention pending completion of travel arrangements; is allowed to choose when to depart (subject to certain constraints); and can select the country of destination. And, of great importance, by departing voluntarily the alien facilitates the possibility of readmission. The practice was first justified as involving "no warrant of deportation . . . so that if [the alien reapplies] for readmission in the proper way he will not be barred." 2 National Commission on Law Observance and Enforcement: Report on the Enforcement of the Deportation Laws of the United States 57, 102–103 (1931) (Report No. 5). The current statute likewise allows an alien who voluntarily departs to sidestep some of the penalties attendant to deportation. Under the current Act, an alien involuntarily removed from the United States is ineligible for readmission for a period of 5, 10, or 20 years, depending upon the circumstances of

removal. See 8 U. S. C. § 1182(a)(9)(A)(i) ("Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal . . .) is inadmissible"); § 1182(a)(9)(A)(ii) ("Any alien not described in clause (i) who—(I) has been ordered removed under section [240] or any other provision of law, or (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal . . . is inadmissible"). An alien who makes a timely departure under a grant of voluntary departure, on the other hand, is not subject to these restrictions—although he or she otherwise may be ineligible for readmission based, for instance, on an earlier unlawful presence in the United States, see § 1182(a)(9)(B)(i).

B

A motion to reopen is a form of procedural relief that "asks the Board to change its decision in light of newly discovered evidence or a change in circumstances since the hearing." 1 Gordon § 3.05[8][c], at 3–76.32. Like voluntary departure, reopening is a judicial creation later codified by federal statute. An early reference to the procedure was in 1916, when a Federal District Court addressed an alien's motion to reopen her case to provide evidence of her marriage to a United States citizen. See *Ex parte Chan Shee*, 236 F. 579 (ND Cal.); see also *Chew Hoy Quong* v. *White*, 244 F. 749, 750 (CA9 1917) (addressing an application to reopen to correct discrepancies in testimony). "The reopening of a case by the immigration authorities for the introduction of further evidence" was treated then, as it is now, as "a matter for the exercise of their discretion"; where the alien was given a "full opportunity to testify and to present all witnesses and documentary evidence at the original hearing," judicial in-

terference was deemed unwarranted. *Wong Shong Been* v. *Proctor*, 79 F. 2d 881, 883 (CA9 1935).

In 1958, when the BIA was established, the Attorney General promulgated a rule for the reopening and reconsideration of removal proceedings, 8 CFR §3.2, upon which the current regulatory provision is based. See 23 Fed. Reg. 9115, 9118–9119 (1958), final rule codified at 8 CFR §3.2 (1959) ("The Board may on its own motion reopen or reconsider any case in which it has rendered a decision" upon a "written motion"); see also BIA: Powers; and Reopening or Reconsideration of Cases, 27 Fed. Reg. 96–97 (1962). Until 1996, there was no time limit for requesting the reopening of a case due to the availability of new evidence.

Then, in 1990, "fear[ful] that deportable or excludable aliens [were] try[ing] to prolong their stays in the U. S. by filing one type of discretionary relief . . . after another in immigration proceedings," Justice Dept. Finds Aliens Not Abusing Requests for Relief, 68 Interpreter Releases 907, 908 (July 22, 1991) (No. 27), Congress ordered the Attorney General to "issue regulations with respect to . . . the period of time in which motions to reopen . . . may be offered in deportation proceedings," including "a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions," Immigration Act of 1990, §545(d)(1), 104 Stat. 5066. The Attorney General found little evidence of abuse, concluding that requirements for reopening are a disincentive to bad faith filings. See 68 Interpreter Releases, *supra*. Because "Congress . . . neither rescinded [n]or amended its mandate to limit the number and time frames of motions," however, the Department of Justice (DOJ) issued a regulation imposing new time limits and restrictions on filings. The new regulation allowed the alien to file one motion to reopen within 90 days. Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18900, 18901, 18905 (1996); see 8 CFR §3.2 (1996).

With the 1996 enactment of the Act, Congress adopted the recommendations of the DOJ with respect to numerical and time limits. The current provision governing motions to reopen states:

> "(A) In general
>
> "An alien may file one motion to reopen proceedings under this section . . . .
>
> "(B) Contents
>
> "The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.
>
> "(C) Deadline
>
> "(i) In general
>
> "Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U. S. C. § 1229a(c)(7) (2000 ed., Supp. V).

To qualify as "new," § 1229a(c)(7)(B), the facts must be "material" and of the sort that "could not have been discovered or presented at the former hearing," 8 CFR § 1003.2(c)(1) (2007); 1 Gordon § 3.05[8][c], at 3–76.34 ("Evidence is not previously unavailable merely because the movant chose not to testify or to present evidence earlier, or because the IJ refused to admit the evidence"). There are narrow exceptions to the 90-day filing period for asylum proceedings and claims of battered spouses, children, and parents, see 8 U. S. C. §§ 1229a(c)(7)(C)(ii), (iv) (2000 ed., Supp. V), which are not applicable here.

The Act, to be sure, limits in significant ways the availability of the motion to reopen. It must be noted, though, that the Act transforms the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien. Nowhere in § 1229c(b) or § 1229a(c)(7) did Congress discuss the impact of the statutory right to file a motion to reopen

on a voluntary departure agreement. And no legislative history indicates what some Members of Congress might have intended with respect to the motion's status once the voluntary departure period has elapsed. But the statutory text is plain insofar as it guarantees to each alien the right to file "one motion to reopen proceedings under this section." § 1229a(c)(7)(A) (2000 ed., Supp. V).

III

The Government argues that, by requesting and obtaining permission to voluntarily depart, the alien knowingly surrenders the opportunity to seek reopening. See Brief for Respondent 29–30. Further, according to the Government, petitioner's proposed rule for tolling the voluntary departure period would undermine the "carefully crafted rules governing voluntary departure," including the statutory directive that these aliens leave promptly. *Id.*, at 18, 46–47.

To be sure, 8 U. S. C. § 1229c(b)(2) contains no ambiguity: The period within which the alien may depart voluntarily "shall not be valid for a period exceeding 60 days." See also 8 CFR § 1240.26(f) (2007) ("In no event can the total period of time, including any extension, exceed" the statutory periods prescribed by 8 U. S. C. §§ 1229c(a) and 1229c(b)); § 1229c(d) (2000 ed. and Supp. V) (imposing statutory penalties for failure to depart). Further, § 1229a(c)(7) does not forbid a scheme under which an alien knowingly relinquishes the right to seek reopening in exchange for other benefits, including those available to the alien under the voluntary departure statute. That does not describe this case, however. Nothing in the statutes or past usage with respect to voluntary departure or motions to reopen indicates they cannot coexist. Neither § 1229a(c)(7) nor § 1229c(b)(2) says anything about the filing of a motion to reopen by an alien who has requested and been granted the opportunity to voluntarily depart. And there is no other statutory language that would place the alien on notice of an inability to seek the

case's reopening in the event of newly discovered evidence or changed circumstances bearing upon eligibility for relief.

In reading a statute we must not "look merely to a particular clause," but consider "in connection with it the whole statute." *Kokoszka* v. *Belford*, 417 U. S. 642, 650 (1974) (quoting *Brown* v. *Duchesne*, 19 How. 183, 194 (1857); internal quotation marks omitted); see also *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 407 (1991) ("'In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy'" (quoting *Crandon* v. *United States*, 494 U. S. 152, 158 (1990))); *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1850) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy").

Reading the Act as a whole, and considering the statutory scheme governing voluntary departure alongside the statutory right granted to the alien by 8 U. S. C. § 1229a(c)(7)(A) (2000 ed., Supp. V) to pursue "one motion to reopen proceedings," the Government's position that the alien is not entitled to pursue a motion to reopen if the alien agrees to voluntarily depart is unsustainable. It would render the statutory right to seek reopening a nullity in most cases of voluntary departure. (And this group is not insignificant in number; between 2002 and 2006, 897,267 aliens were found removable, of which 122,866, or approximately 13.7%, were granted voluntary departure. See DOJ, Executive Office for Immigration Review, FY 2006 Statistical Year Book, p. Q1 (Feb. 2007).) It is foreseeable, and quite likely, that the time allowed for voluntary departure will expire long before the BIA issues a decision on a timely filed motion to reopen. See Proposed Rules, DOJ, Executive Office for Immigration Review, Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review, 72 Fed. Reg. 67674, 67677, and n. 2 (2007) ("As a practical matter, it is often the

case that an immigration judge or the Board cannot reasonably be expected to adjudicate a motion to reopen or reconsider during the voluntary departure period"). These practical limitations must be taken into account. In the present case the BIA denied petitioner's motion to reopen 68 days after he filed the motion—and 66 days after his voluntary departure period had expired. Although the record contains no statistics on the average disposition time for motions to reopen, the number of BIA proceedings has increased over the last two decades, doubling between 1992 and 2000 alone; and, as a result, the BIA's backlog has more than tripled, resulting in a total of 63,763 undecided cases in 2000. See Dorsey & Whitney LLP, Study Conducted for: the American Bar Association Commission on Immigration Policy, Practice and Pro Bono Re: Board of Immigration Appeals: Procedural Reforms To Improve Case Management 13 (2003), online at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

Since 2000, the BIA has adopted new procedures to reduce its backlog and shorten disposition times. In 2002, the DOJ introduced rules to improve case management, including an increase in the number of cases referred to a single Board member and use of summary disposition procedures for cases without basis in law or fact. See BIA: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54878 (2002), final rule codified at 8 CFR § 1003.1 *et seq.* (2006); see also § 1003.1(e)(4) (summary affirmance procedures). Nevertheless, on September 30, 2005, there were 33,063 cases pending before the BIA, 18% of which were more than a year old. See FY 2006 Statistical Year Book, *supra*, at U1. On September 30, 2006, approximately 20% of the cases pending had been filed during fiscal year 2005. See *ibid.* Whether an alien's motion will be adjudicated within the 60-day statutory period in all likelihood will depend on pure happenstance—namely, the backlog of the particular Board member to whom the motion is assigned. Cf. *United States* v. *Wil-*

son, 503 U. S. 329, 334 (1992) (arbitrary results are "not to be presumed lightly").

Absent tolling or some other remedial action by the Court, then, the alien who is granted voluntary departure but whose circumstances have changed in a manner cognizable by a motion to reopen is between Scylla and Charybdis: He or she can leave the United States in accordance with the voluntary departure order; but, pursuant to regulation, the motion to reopen will be deemed withdrawn. See 8 CFR § 1003.2(d); see also 23 Fed. Reg. 9115, 9118, final rule codified at 8 CFR § 3.2 (1958). Alternatively, if the alien wishes to pursue reopening and remains in the United States to do so, he or she risks expiration of the statutory period and ineligibility for adjustment of status, the underlying relief sought. See 8 U. S. C. § 1229c(d)(1) (2000 ed., Supp. V) (failure to timely depart renders alien "ineligible, for a period of 10 years," for cancellation of removal under § 240A, adjustment of status under § 245, change of nonimmigrant status under § 248, and registry under § 249 of the INA); see also App. to Pet. for Cert. 3–4 (treating petitioner's motion to reopen as forfeited for failure to depart).

The purpose of a motion to reopen is to ensure a proper and lawful disposition. We must be reluctant to assume that the voluntary departure statute was designed to remove this important safeguard for the distinct class of deportable aliens most favored by the same law. See 8 U. S. C. §§ 1229c(a)(1), (b)(1)(C) (barring aliens who have committed, *inter alia*, aggravated felonies or terrorism offenses from receiving voluntary departure); § 1229c(b)(1)(B) (requiring an alien who obtains voluntary departure at the conclusion of removal proceedings to demonstrate "good moral character"). This is particularly so when the plain text of the statute reveals no such limitation. See *Costello* v. *INS*, 376 U. S. 120, 127–128 (1964) (counseling long hesitation "before adopting a construction of [the statute] which would, with respect to an entire class of aliens, completely nullify a pro-

cedure so intrinsic a part of the legislative scheme"); see also *Stone* v. *INS*, 514 U. S. 386, 399 (1995) ("Congress might not have wished to impose on the alien" the difficult choice created by treating a motion to reopen as rendering the underlying order nonfinal for purposes of judicial review); *INS* v. *St. Cyr*, 533 U. S. 289, 320 (2001) (recognizing "'the long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien'" (quoting *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 449 (1987))).

IV

A

It is necessary, then, to read the Act to preserve the alien's right to pursue reopening while respecting the Government's interest in the *quid pro quo* of the voluntary departure arrangement.

Some solutions, though, do not conform to the statutory design. Petitioner, as noted, proposes automatic tolling of the voluntary departure period during the pendency of the motion to reopen. We do not find statutory authority for this result. Voluntary departure is an agreed-upon exchange of benefits, much like a settlement agreement. In return for anticipated benefits, including the possibility of readmission, an alien who requests voluntary departure represents that he or she "has the means to depart the United States and intends to do so" promptly. 8 U. S. C. § 1229c(b)(1)(D); 8 CFR §§ 1240.26(c)(1)–(2) (2007); cf. § 1240.26(c)(3) (the judge may impose additional conditions to "ensure the alien's timely departure from the United States"). Included among the substantive burdens imposed upon the alien when selecting voluntary departure is the obligation to arrange for departure, and actually depart, within the 60-day period. Cf. *United States* v. *Brockamp*, 519 U. S. 347, 352 (1997) (substantive limitations are not subject to equitable tolling). If the alien is permitted to stay in the United States past the departure date to wait out the adjudi-

cation of the motion to reopen, he or she cannot then demand the full benefits of voluntary departure; for the benefit to the Government—a prompt and costless departure—would be lost. Furthermore, it would invite abuse by aliens who wish to stay in the country but whose cases are not likely to be reopened by immigration authorities.

B

Although a statute or regulation might be adopted to resolve the dilemma in a different manner, as matters now stand the appropriate way to reconcile the voluntary departure and motion to reopen provisions is to allow an alien to withdraw the request for voluntary departure before expiration of the departure period.

The DOJ, which has authority to adopt regulations relevant to the issue at hand, has made a preliminary determination that the Act permits an alien to withdraw an application for voluntary departure before expiration of the departure period. According to this proposal, there is nothing in the Act or the implementing regulations that makes the grant of voluntary departure irrevocable. See 72 Fed. Reg. 67679. Accordingly, the DOJ has proposed an amendment to 8 CFR § 1240.26 that, prospectively, would "provide for the automatic termination of a grant of voluntary departure upon the timely filing of a motion to reopen or reconsider, as long as the motion is filed prior to the expiration of the voluntary departure period." 72 Fed. Reg. 67679, Part IV–D; cf. *id.*, at 67682, Part VI ("The provisions of this proposed rule will be applied prospectively only, that is, only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure"). Although not binding in the present case, the DOJ's proposed interpretation of the statutory and regulatory scheme as allowing an alien to withdraw from a voluntary departure agreement "warrants respectful consideration." *Wisconsin Dept. of Health and Family Servs.* v. *Blumer*, 534

U. S. 473, 497 (2002) (citing *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), and *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504 (1994)).

We hold that, to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen. As a result, the alien has the option either to abide by the terms, and receive the agreed-upon benefits, of voluntary departure; or, alternatively, to forgo those benefits and remain in the United States to pursue an administrative motion.

If the alien selects the latter option, he or she gives up the possibility of readmission and becomes subject to the IJ's alternative order of removal. See 8 CFR § 1240.26(d). The alien may be removed by the DHS within 90 days, even if the motion to reopen has yet to be adjudicated. See 8 U. S. C. § 1231(a)(1)(A). But the alien may request a stay of the order of removal, see BIA Practice Manual § 6.3(a), http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm; cf. 8 U. S. C. § 1229a(b)(5)(C) (providing that a removal order entered *in absentia* is stayed automatically pending a motion to reopen); and, though the BIA has discretion to deny the motion for a stay, it may constitute an abuse of discretion for the BIA to do so where the motion states nonfrivolous grounds for reopening.

Though this interpretation still confronts the alien with a hard choice, it avoids both the quixotic results of the Government's proposal and the elimination of benefits to the Government that would follow from petitioner's tolling rule. Contrary to the Government's assertion, the rule we adopt does not alter the *quid pro quo* between the Government and the alien. If withdrawal is requested prior to expiration of the voluntary departure period, the alien has not received benefits without costs; the alien who withdraws from a voluntary departure arrangement is in the same position as an

alien who was not granted voluntary departure in the first instance. Allowing aliens to withdraw from their voluntary departure agreements, moreover, establishes a greater probability that their motions to reopen will be considered. At the same time, it gives some incentive to limit filings to nonfrivolous motions to reopen; for aliens with changed circumstances of the type envisioned by Congress in drafting § 1229a(c)(7) (2000 ed. and Supp. V) are the ones most likely to forfeit their previous request for voluntary departure in return for the opportunity to adjudicate their motions. Cf. Supp. Brief for Respondent 1–2 ("[I]t is extraordinarily rare for an alien who has requested and been granted voluntary departure by the BIA to seek to withdraw from that arrangement within the voluntary departure period").

A more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen postdeparture, much as Congress has permitted with respect to judicial review of a removal order. See IIRIRA § 306(b), 110 Stat. 3009–612 (repealing 8 U. S. C. § 1105a(c) (1994 ed.), which prohibited an alien who "departed from the United States after the issuance of the order" to seek judicial review). As noted previously, 8 CFR § 1003.2(d) provides that the alien's departure constitutes withdrawal of the motion to reopen. This regulation, however, has not been challenged in these proceedings, and we do not consider it here.

* * *

Petitioner requested withdrawal of his motion for voluntary departure prior to expiration of his 30-day departure period. The BIA should have granted this request, without regard to the merits of petitioner's I–130 petition, and permitted petitioner to pursue his motion to reopen. We find this same mistake implicit in the Court of Appeals' decision. We reverse the judgment of the Court of Appeals and re-

mand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The statutory provision at issue here authorizes the Attorney General to permit an alien who has been found deportable, if he so requests, to depart the country voluntarily. This enables the alien to avoid detention pending involuntary deportation, to select his own country of destination, to leave according to his own schedule (within the prescribed period), and to avoid restrictions upon readmission that attend involuntary departure. The statute specifies that the permission "shall not be valid for a period exceeding 60 days," 8 U. S. C. § 1229c(b)(2), and that failure to depart within the prescribed period causes the alien to be ineligible for certain relief, including adjustment of status, for 10 years, § 1229c(d)(1) (2000 ed., Supp. V). Moreover, pursuant to a regulation that the Court accepts as valid, departure (whether voluntary or involuntary) terminates the alien's ability to move for reopening of his removal proceeding, and withdraws any such motion filed before his departure. See 8 CFR § 1003.2(d) (2007). All of these provisions were in effect when petitioner agreed to depart, and the Court cites no statute or regulation currently in force that permits an alien who has agreed voluntarily to depart to change his mind. Yet the Court holds that petitioner must be permitted to renounce that agreement (the opinion dresses this up as "withdraw[ing] the motion for voluntary departure") provided the request is made before the departure period expires. *Ante*, at 5. That is "necessary," the Court says, to "preserve the alien's right to pursue reopening," *ante*, at 19, forfeiture of which was the known consequence of the departure he had agreed to. The Court's perceived "necessity" does not exist,

and the Court lacks the authority to impose its chosen remedy. I respectfully dissent.

The Court is resolute in its belief that there is a "conflict between the right to file a motion to reopen and the provision requiring voluntary departure no later than 60 days." *Ante*, at 5. The statute cannot be interpreted to put the alien to the choice of either (1) "remain[ing] in the United States to ensure [his] motion to reopen remains pending, while incurring statutory penalties for overstaying the voluntary departure date" or (2) "avoid[ing] penalties by prompt departure but abandon[ing] the motion to reopen." *Ibid.* This, according to the Court, would "render the statutory right to seek reopening a nullity in most cases of voluntary departure." *Ante*, at 16. Indeed, the problem is of mythological proportions: "[T]he alien who is granted voluntary departure but whose circumstances have changed in a manner cognizable by a motion to reopen is between Scylla and Charybdis: He or she can leave the United States in accordance with the voluntary departure order; but, pursuant to regulation, the motion to reopen will be deemed withdrawn." *Ante*, at 18. So certain is the Court of this premise that it is asserted no less than seven times during the course of today's opinion. See *ante*, at 5, 16, 18–22.

The premise is false. It would indeed be extraordinary (though I doubt it would justify a judicial rewrite) for a statute to impose that stark choice upon an alien: depart and lose your right to seek reopening, or stay and incur statutory penalties. But that is *not* the choice this statute imposes. It offers the alien a deal, if he finds it in his interest and wishes to take it: "Agree to depart voluntarily (within the specified period, of course) and you may lose your right to pursue reopening, but you will not suffer detention, you can depart at your own convenience rather than ours, and to the destination that you rather than we select, and you will not suffer the statutory restrictions upon reentry that accompany involuntary departure. If you accept this deal, how-

ever, but do not live up to it—if you fail to depart as promised within the specified period—you will become ineligible for cancellation of removal, adjustment of status, and voluntary departure." Seems entirely reasonable to me. Litigants are put to similar voluntary choices between the rock and the whirlpool all the time, without cries for a judicial rewrite of the law. It happens, for example, whenever a criminal defendant is offered a plea bargain that gives him a lesser sentence than he might otherwise receive but deprives him of his right to trial by jury and his right to appeal. It is indeed utterly commonplace that *electing* to pursue one avenue of relief may require the surrender of certain other remedies.

Petitioner requested and accepted the above described deal, but now—to put the point bluntly but entirely accurately—he wants to back out. The case is as simple as that. Two days before the deadline for his promised voluntary departure, he filed a motion asking the Board of Immigration Appeals (BIA) to reopen his removal proceedings and remand his case to the Immigration Judge for adjustment of status based on his wife's pending visa petition. Administrative Record 3; see *id.*, at 8–21. The motion also asked the BIA to "withdraw his request for voluntary departure" and "instead accep[t] an order of deportation." *Id.*, at 10. After the voluntary departure period expired, the BIA denied petitioner's motion to reopen, explaining that under 8 U. S. C. § 1229c(d) (2000 ed. and Supp. V), "an alien who fails to depart following a grant of voluntary departure . . . is statutorily barred from applying for certain forms of discretionary relief." App. to Pet. for Cert. 3–4.

It seems to me that the BIA proceeded just as it should have, and just as petitioner had every reason to expect. To be sure, the statute provides for the right to file (and presumably to have ruled upon in due course) a petition to reopen. But it does not forbid the relinquishment of that right in exchange for other benefits that the BIA has discretion to

provide. Nor does it suggest any weird departure from the ancient rule that an offer (the offer to depart voluntarily in exchange for specified benefits, and with specified consequences for default) cannot be "withdrawn" after it has been accepted and after the *quid pro quo* promise (to depart) has been made.

The Court's rejection of this straightforward analysis is inconsistent with its treatment of petitioner's argument that the statute requires automatic tolling of the voluntary departure period while a motion to reopen is pending. With respect to that argument, the Court says:

> "Voluntary departure is an agreed-upon exchange of benefits, much like a settlement agreement. In return for anticipated benefits, including the possibility of readmission, an alien who requests voluntary departure represents that he or she 'has the means to depart the United States and intends to do so' promptly. Included among the substantive burdens imposed upon the alien when selecting voluntary departure is the obligation to arrange for departure, and actually depart, within the 60-day period." *Ante*, at 19 (citations omitted).

Precisely so. But also among the substantive burdens is the inability to receive certain relief through a motion to reopen once the promised departure date has passed; and perhaps paramount among the substantive burdens is that the alien is *bound* to his agreement. The Court is quite right that the Act does not allow us to require that an alien who agrees to depart voluntarily must receive the benefits of his bargain without the costs. But why does it allow us to convert the alien's statutorily required promise to depart voluntarily into an "option either to abide by the terms, and receive the agreed-upon benefits, of voluntary departure; or, alternatively, to forgo those benefits and remain in the United States to pursue an administrative motion"? *Ante*, at 21. And why does it allow us to nullify the provision of

§ 1229c(d)(1) that failure to depart within the prescribed and promised period causes the alien to be ineligible for certain relief, including adjustment of status (which is what petitioner seeks here) for 10 years?

Of course it is not unusual for the Court to blue-pencil a statute in this fashion, directing that one of its provisions, severable from the rest, be disregarded. But that is done when the blue-penciled provision is *unconstitutional*. It would be unremarkable, if the Court found that the alien had a constitutional right to reopen, and that conditioning permission for voluntary departure upon waiver of that right was an unconstitutional condition, for the Court to order that the alien cannot be held to his commitment. But that is not the case here. The Court holds that the plain requirement of the statute and of validly adopted regulations cannot be enforced *because the statute itself forbids it*.

Not so. The Court derives this prohibition from its belief that an alien must, no matter what, be given the full benefit of the right to reopen, even if that means creating an extra-statutory option to renege upon the statutorily contemplated agreement to depart voluntarily. "We must be reluctant to assume," the Court says, "that the voluntary departure statute was designed to remove this important safeguard [of the motion to reopen]," "particularly so when the plain text of the statute reveals no such limitation." *Ante*, at 18. But in fact that safeguard is not sacrosanct. The "plain text of the statute" does *cause* voluntary departure to remove that safeguard for at least 30 days of its 90-day existence, and *permits* voluntary departure to remove it almost entirely. Section 1229a(c)(7) (2000 ed., Supp. V) generally permits the filing of a motion to reopen "within 90 days of . . . entry of a final administrative order of removal." But as I have described, § 1229c(b)(2) (2000 ed.) provides that a grant of voluntary departure issued at the conclusion of removal proceedings "shall not be valid for a period exceeding 60 days." Since motions to reopen cannot be filed after removal or de-

parture, the unquestionable effect of the statutory scheme is to deprive the alien who agrees to voluntary departure of the (sacrosanct) right to reopen for a full third of its existence. And since 60 days is merely the maximum period for a voluntary departure, it is theoretically possible for the right to reopen to be limited to one week, or even one day. Given that reality, it is not at all hard to believe that the statute allows nullification of motions to reopen requesting adjustment of status filed within the 60-day departure period and not ruled upon before departure. Indeed, it seems to me much more likely that the statute allows that than that it allows judicial imposition of the unheard-of rule that a promise to depart is not a promise to depart, and judicial nullification of a statutorily prescribed penalty for failure to depart by the gimmick of allowing the request for voluntary departure to be "withdrawn."

The same analysis makes it true that, even under the Court's reconstructed statute, a removable alien's agreement to depart voluntarily may limit, and in some instances foreclose, his ability to pursue a motion to reopen at a later date. Even if the alien who has agreed to voluntary departure is permitted to renege within the specified departure period, that period can be no longer than 60 days after entry of the order of removal—meaning that he has been deprived of at least 30 days of his right to reopen. Thus, the Court has not "reconciled" statutory provisions; it has simply rewritten two of them to satisfy its notion of sound policy—the requirement of a commitment to depart and the prescription that a failure to do so prevents adjustment of status.

The Court suggests that the statute compels its conclusion because otherwise "[w]hether an alien's motion will be adjudicated within the 60-day statutory period in all likelihood will depend on pure happenstance—namely, the backlog of the particular Board member to whom the motion is assigned" and because "arbitrary results are 'not to be presumed lightly.'" *Ante*, at 17–18. It is, however, a happenstance that the alien embraces when he makes his

commitment to leave, and its effect upon him is therefore not arbitrary. If he wants to be sure to have his motion to reopen considered, he should not enter into the voluntary departure agreement. A reading of the statute that permits that avoidable happenstance seems to me infinitely more plausible than a reading that turns a commitment to depart into an option to depart.

But the most problematic of all the Court's reasons for allowing petitioner to withdraw his motion to depart voluntarily is its reliance on the Department of Justice's (DOJ) as-yet-unadopted proposal that is in some respects (though not the crucial one) similar to the Court's rule. See *ante*, at 20–21 (citing Proposed Rules, DOJ, Executive Office for Immigration Review, Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review, 72 Fed. Reg. 67674, 67677, and n. 2 (2007)). I shall assume that the proposed rule would be valid, even though it converts the statutory *requirement* of departure within the prescribed period (on pain of losing the right to seek adjustment of status) into an *option* to depart.[1] According to the Court, the proposed regulation "'warrants respectful consideration.'" *Ante*, at 20. What this evidently means is respectful adoption of that portion of the proposed regulation with which the Court agrees, and *sub silentio* rejection of that portion it disfavors, namely: "The provisions of this proposed rule will be applied . . . only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure," 72 Fed. Reg. 67682. See Supp. Brief for Respondent 8–9 (observing that the rule "will not apply to petitioner's case").

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[1] An agency need not adopt, as we must, the *best* reading of a statute, but merely one that is permissible. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 866 (1984). Moreover, the proposed rule, operating only prospectively, makes the ability to withdraw part of the deal that the alien accepts, and limits the alien's commitment accordingly. Petitioner's promise has already been made, and the requirement that he depart within the specified period is unconditional.

Our administrative law jurisprudence is truly in a state of confused degeneration if this pick-and-choose technique constitutes "respectful" consideration.

It must be acknowledged, however, that the Department's proposed regulation has some bearing upon this case: It demonstrates that the agency is actively considering whether the terms it has prescribed for its discretionary grants of voluntary departure are too harsh and should be revised for the future, perhaps along the very lines that the Justices in today's majority would choose if they were the Attorney General. It shows, in other words, that today's interpretive gymnastics may have been performed, not for the enjoyment of innumerable aliens in the future, but for Mr. Dada alone.

* * *

In the final analysis, the Court's entire approach to interpreting the statutory scheme can be summed up in this sentence from its opinion: "Allowing aliens to withdraw from their voluntary departure agreements . . . establishes a greater probability that their motions to reopen will be considered." *Ante*, at 22. That is true enough. What does not appear from the Court's opinion, however, is the source of the Court's authority to increase that probability in flat contradiction to the text of the statute. Just as the *Government* can (absent some other statutory restriction) relieve criminal defendants of their plea agreements for one reason or another, the *Government* may well be able to let aliens who have agreed to depart the country voluntarily repudiate their agreements. This Court lacks such authority, and nothing in the statute remotely dictates the result that today's judgment decrees. I would affirm the judgment of the Court of Appeals.[2]

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[2]JUSTICE ALITO agrees that the statute does not require the BIA to grant petitioner's motion to withdraw from his agreement to depart voluntarily. He chooses to remand the case because the BIA did not give the reason for its denial of the withdrawal motion, and he believes the reason

JUSTICE ALITO, dissenting.

This case presents two questions: (1) "[w]hether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart . . . under an order granting voluntary departure," Brief for Petitioner i, and (2) "[w]hether an alien who has been granted voluntary departure and has filed a timely motion to reopen should be permitted to withdraw the request for voluntary departure prior to the expiration of the departure period," 552 U. S. 1138 (2008). I agree with the Court that the answer to the first question is no. *Ante*, at 5.

As to the second question, the Court's reasoning escapes me. The Court holds as follows: "*Absent a valid regulation resolving the dilemma in a different way*," "the appropriate way to reconcile the" relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 "is to allow an alien to withdraw the request for voluntary departure before expiration of the departure period." *Ante*, at 5, 20 (emphasis added). Thus, the Court apparently does not hold that the statute compels the Government to permit an alien to withdraw a request for voluntary departure, only that the statute permits that approach, a proposition with which I agree.

Since the statute does not decide the question whether an alien should be permitted to withdraw a voluntary departure request, the authority to make that policy choice rests with the agency. See, *e. g.*, *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996) (noting the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency"); *De-*

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would be the wrong one if the BIA thought it lacked statutory authority to grant. *Post*, at 32 (dissenting opinion). But petitioner has challenged neither the adequacy of the BIA's reason for denying his motion, nor the BIA's failure to specify a reason. He has argued only that the statute requires that he be allowed to withdraw.

partment of Treasury, IRS v. *FLRA*, 494 U. S. 922, 932–933 (1990) (refusing to sustain an agency's decision on the ground that it was based on "a permissible (though not an inevitable) construction of [a] statute," because the agency should define and adopt that construction "in the first instance"). Accordingly, at the time of the decision in petitioner's case, the Board of Immigration Appeals (BIA or Board) had the authority (1) to adopt the majority's automatic withdrawal rule (indeed, the agency has proposed a regulation to that effect, see *ante*, at 20), (2) to decide that withdrawal should be permitted in certain circumstances, which may or may not be present here, or (3) to hold that a motion to withdraw is never appropriate.

Neither the BIA nor the Fifth Circuit addressed petitioner's motion to withdraw, see *ante*, at 7, and therefore the ground for the Board's decision is unclear. I would affirm if the BIA either chose as a general matter not to permit the withdrawal of requests for voluntary departure or decided that permitting withdrawal was not appropriate under the facts of this case. However, if the BIA rejected the withdrawal request on the ground that it lacked the statutory authority to permit it, the Board erred. Because the ground for the BIA's decision is uncertain, I would vacate and remand.

Syllabus

FLORIDA DEPARTMENT OF REVENUE *v.* PICCADILLY CAFETERIAS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07–312. Argued March 26, 2008—Decided June 16, 2008

After respondent (Piccadilly) declared bankruptcy under Chapter 11, but before its plan was submitted to the Bankruptcy Court, that court authorized Piccadilly to sell its assets, approved its settlement agreement with creditors, and granted it an exemption under 11 U. S. C. § 1146(a), which provides a stamp-tax exemption for any asset transfer "under a plan confirmed under section 1129." After the sale, Piccadilly filed its Chapter 11 plan, but before the plan could be confirmed, petitioner Florida Department of Revenue (Florida) objected, arguing that the stamp taxes it had assessed on certain of the transferred assets fell outside § 1146(a)'s exemption because the transfer had not been under a confirmed plan. The court granted Piccadilly summary judgment. The Eleventh Circuit affirmed, holding that § 1146(a)'s exemption applies to preconfirmation transfers necessary to the consummation of a confirmed Chapter 11 plan, provided there is some nexus between such transfers and the plan; that § 1146(a)'s text was ambiguous and should be interpreted consistent with the principle that a remedial statute should be construed liberally; and that this interpretation better accounted for the practicalities of Chapter 11 cases because a debtor may need to transfer assets to induce relevant parties to endorse a proposed plan's confirmation.

Held: Because § 1146(a) affords a stamp-tax exemption only to transfers made pursuant to a Chapter 11 plan that has been confirmed, Piccadilly may not rely on that provision to avoid Florida's stamp taxes. The most natural reading of § 1146(a)'s text, the provision's placement within the Bankruptcy Code, and applicable canons of statutory construction lead to this conclusion. Pp. 38–52.

(a) Florida's reading of § 1146(a) is the most natural. Contending that the text unambiguously limits stamp-tax exemptions to postconfirmation transfers made under the authority of a confirmed plan, Florida argues that "plan confirmed" denotes a plan confirmed in the past, and that "under" should be read to mean "with the authorization of" or "inferior or subordinate" to its referent, here the confirmed plan, see *Ardestani* v. *INS*, 502 U. S. 129, 135. Piccadilly counters that the provision does not unambiguously impose a temporal requirement, contend-

ing that had Congress intended "plan confirmed" to mean "confirmed plan," it would have used that language, and that "under" is as easily read to mean "in accordance with." While both sides present credible interpretations, Florida's is the better one. Congress could have used more precise language and thus removed all ambiguity, but the two readings are not equally plausible. Piccadilly's interpretation places greater strain on the statutory text than Florida's simpler construction. And Piccadilly's emphasis on the distinction between "plan confirmed" and "confirmed plan" is unavailing because § 1146(a) specifies not only that a transfer be "under a plan," but also that the plan be confirmed pursuant to § 1129. Ultimately this Court need not decide whether § 1146(a) is unambiguous on its face, for, based on the parties' other arguments, any ambiguity must be resolved in Florida's favor. Pp. 39–41.

(b) Even on the assumption that § 1146(a)'s text is ambiguous, reading it in context with other relevant Code provisions reveals nothing justifying Piccadilly's claims that had Congress intended § 1146(a) to apply exclusively to postconfirmation transfers, it would have made its intent plain with an express temporal limitation, and that "under" should be construed broadly to mean "in accordance with." If statutory context suggests anything, it is that § 1146(a) is inapplicable to preconfirmation transfers. The provision's placement in a subchapter entitled "POST-CONFIRMATION MATTERS" undermines Piccadilly's view that it extends to preconfirmation transfers. Piccadilly's textual and contextual arguments, even if fully accepted, would establish at most that the statutory language is ambiguous, not that the purported ambiguity should be resolved in Piccadilly's favor. Pp. 41–47.

(c) The federalism canon articulated in *California State Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U. S. 844, 851–852—that courts should "'proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed'"—obliges the Court to construe § 1146(a)'s exemption narrowly. Piccadilly's interpretation would require the Court to do exactly what the canon counsels against: recognize an exemption that Congress has not clearly expressed, namely, an exemption for preconfirmation transfers. The various substantive canons on which Piccadilly relies for its interpretation—most notably, that a remedial statute should be construed liberally—are inapposite in this case. Pp. 47–52.

484 F. 3d 1299, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, GINSBURG, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 53.

Scott D. Makar, Solicitor General of Florida, argued the cause for petitioner. With him on the briefs were *Bill McCollum*, Attorney General, *Craig D. Feiser*, Deputy Solicitor General, and *Frederick F. Rudzik*.

G. Eric Brunstad, Jr., argued the cause for respondent. With him on the brief were *Robert A. Brundage*, *Rheba Rutkowski*, *Collin O'Connor Udell*, and *Paul Steven Singerman*.*

JUSTICE THOMAS delivered the opinion of the Court.

The Bankruptcy Code provides a stamp-tax exemption for any asset transfer "under a plan confirmed under [Chapter 11]" of the Code. 11 U. S. C. §1146(a) (2000 ed., Supp. V). Respondent Piccadilly Cafeterias, Inc., was granted an exemption for assets transferred after it had filed for bankruptcy but before its Chapter 11 plan was submitted to, and confirmed by, the Bankruptcy Court. Petitioner, the Florida Department of Revenue, seeks reversal of the decision of

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Michael A. Scodro*, Solicitor General, *Jane Elinor Notz*, Deputy Solicitor General, and *James D. Newbold*, Assistant Attorney General, by *Benna Ruth Solomon*, *Michael A. Cardozo*, *Martha E. Johnston*, *Dennis J. Herrera*, and *Danny Chou*, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Richard Blumenthal* of Connecticut, *Joseph R. Biden III* of Delaware, *Mark J. Bennett* of Hawaii, *Tom Miller* of Iowa, *Paul J. Morrison* of Kansas, *G. Steven Rowe* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Anne Milgram* of New Jersey, *Andrew M. Cuomo* of New York, *Marc Dann* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; and for the International City/County Management Association et al. by *Richard Ruda*.

Richard Lieb filed a brief for Richard Aaron et al. as *amici curiae* urging affirmance.

the Court of Appeals upholding the exemption for Piccadilly's asset transfer. Because we hold that § 1146(a)'s stamp-tax exemption does not apply to transfers made before a plan is confirmed under Chapter 11, we reverse the judgment below.

I

Piccadilly was founded in 1944 and was one of the Nation's most successful cafeteria chains until it began experiencing financial difficulties in the last decade. On October 29, 2003, Piccadilly declared bankruptcy under Chapter 11 of the Bankruptcy Code, § 1101 *et seq.* (2000 ed. and Supp. V), and requested court authorization to sell substantially all its assets outside the ordinary course of business pursuant to § 363(b)(1) (2000 ed., Supp. V). Piccadilly prepared to sell its assets as a going concern and sought an exemption from any stamp taxes on the eventual transfer under § 1146(a) of the Code.[1] The Bankruptcy Court conducted an auction in which the winning bidder agreed to purchase Piccadilly's assets for $80 million.

On January 26, 2004, as a precondition to the sale, Piccadilly entered into a global settlement agreement with committees of senior secured noteholders and unsecured creditors. The settlement agreement dictated the priority of distribution of the sale proceeds among Piccadilly's creditors. On February 13, 2004, the Bankruptcy Court approved the proposed sale and settlement agreement. The court also ruled that the transfer of assets was exempt from stamp taxes under § 1146(a). The sale closed on March 16, 2004.

Piccadilly filed its initial Chapter 11 plan in the Bankruptcy Court on March 26, 2004, and filed an amended plan

[1] When litigation commenced in the lower courts, the stamp-tax exemption was contained in § 1146(c) (2000 ed.). In 2005, Congress repealed subsections (a) and (b), and the stamp-tax exemption was recodified as § 1146(a). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 719(b)(3), 119 Stat. 133. For simplicity, we will cite the provision as it is currently codified.

on July 31, 2004.[2] The plan provided for distribution of the sale proceeds in a manner consistent with the settlement agreement. Before the Bankruptcy Court confirmed the plan, Florida filed an objection, seeking a declaration that the $39,200 in stamp taxes it had assessed on certain of Piccadilly's transferred assets fell outside § 1146(a)'s exemption because the transfer had not been "under a plan confirmed" under Chapter 11. On October 21, 2004, the bankruptcy court confirmed the plan. On cross-motions for summary judgment on the stamp-tax issue, the Bankruptcy Court granted summary judgment in favor of Piccadilly, reasoning that the sale of substantially all Piccadilly's assets was a transfer "'under'" its confirmed plan because the sale was necessary to consummate the plan. App. D to Pet. for Cert. 40a–41a. The District Court upheld the decision on the ground that § 1146(a), in certain circumstances, affords a stamp-tax exemption even when a transfer occurs prior to confirmation. *In re Piccadilly Cafeterias, Inc.*, 379 B. R. 215, 226 (SD Fla. 2006).

The Court of Appeals for the Eleventh Circuit affirmed, holding that "§ 1146[(a)]'s tax exemption may apply to *those* pre-confirmation transfers that are necessary to the consummation of a confirmed plan of reorganization, which, at the

[2] Chapter 11 bankruptcy proceedings ordinarily culminate in the confirmation of a reorganization plan. But in some cases, as here, a debtor sells all or substantially all its assets under § 363(b)(1) (2000 ed., Supp. V) before seeking or receiving plan confirmation. In this scenario, the debtor typically submits for confirmation a plan of liquidation (rather than a traditional plan of reorganization) providing for the distribution of the proceeds resulting from the sale. Here, Piccadilly filed a Chapter 11 liquidation plan after selling substantially all its assets as a going concern. Although the central purpose of Chapter 11 is to facilitate reorganizations rather than liquidations (covered generally by Chapter 7), Chapter 11 expressly contemplates liquidations. See § 1129(a)(11) (2000 ed.) ("Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan").

very least, requires that there be some nexus between the pre-confirmation transfer and the confirmed plan." *In re Piccadilly Cafeterias, Inc.*, 484 F. 3d 1299, 1304 (2007) *(per curiam)*. Finding the statutory text ambiguous, the Court of Appeals concluded that § 1146(a) should be interpreted consistent with "the principle that a remedial statute such as the Bankruptcy Code should be liberally construed." *Ibid.* The court further noted that its interpretation of § 1146(a) better accounted for "the practical realities of Chapter 11 reorganization cases" because a debtor may need to transfer assets to induce relevant parties to endorse the proposed confirmation of a plan. *Ibid.* The Court of Appeals acknowledged that its holding conflicted with the approach taken by the Courts of Appeals for the Third and Fourth Circuits, *id.*, at 1302, which have held that § 1146(a) "does not apply to . . . transactions that occur prior to the confirmation of a plan under Chapter 11 of the Bankruptcy Code," *In re Hechinger Inv. Co. of Del.*, 335 F. 3d 243, 246 (CA3 2003); see also *In re NVR, LP*, 189 F. 3d 442, 458 (CA4 1999) (holding that § 1146(a) "appl[ies] only to transfers under the Plan occurring after the date of confirmation").

We granted certiorari, 552 U. S. 1074 (2007), to resolve the conflict among the Courts of Appeals as to whether § 1146(a) applies to preconfirmation transfers.

II

Section 1146(a), entitled "Special tax provisions," provides: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer *under a plan confirmed under section 1129 of this title*, may not be taxed under any law imposing a stamp tax or similar tax." (Emphasis added.) Florida asserts that § 1146(a) applies only to postconfirmation sales; Piccadilly contends that it extends to preconfirmation transfers as long as they are made in accordance with a plan that is eventually confirmed. Florida and Piccadilly base their competing readings of § 1146(a) on the

provision's text, on inferences drawn from other Code provisions, and on substantive canons of statutory construction. We consider each of their arguments in turn.

A

Florida contends that § 1146(a)'s text unambiguously limits stamp-tax exemptions to postconfirmation transfers made under the authority of a confirmed plan. It observes that the word "confirmed" modifies the word "plan" and is a past participle, *i. e.*, "[a] verb form indicating past or completed action or time that is used as a verbal adjective in phrases such as *baked beans* and *finished work*." American Heritage Dictionary 1287 (4th ed. 2000). Florida maintains that a past participle indicates past or completed action even when it is placed after the noun it modifies, as in "beans baked in the oven," or "work finished after midnight." Thus, it argues, the phrase "plan confirmed" denotes a "confirmed plan"—meaning one that has been confirmed in the past.

Florida further contends that the word "under" in "under a plan confirmed" should be read to mean "with the authorization of" or "inferior or subordinate" to its referent, here the confirmed plan. See *Ardestani* v. *INS*, 502 U. S. 129, 135 (1991) (noting that a thing that is "'under'" a statute is most naturally read as being "'subject to'" or "'governed by'" the statute). Florida points out that, in the other two appearances of "under" in § 1146(a), it clearly means "subject to." Invoking the textual canon that "'identical words used in different parts of the same act are intended to have the same meaning,'" *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 159 (1993), Florida asserts the term must also have its core meaning of "subject to" in the phrase "under a plan confirmed." Florida thus reasons that to be eligible for § 1146(a)'s exemption, a transfer must be subject to a plan that has been confirmed subject to § 1129 (2000 ed. and Supp. V). Echoing the Fourth Circuit's reasoning in

NVR, *supra*, at 457, Florida concludes that a transfer made prior to the date of plan confirmation cannot be subject to, or under the authority of, something that did not exist at the time of the transfer—a confirmed plan.

Piccadilly counters that the statutory language does not unambiguously impose a temporal requirement. It contends that "plan confirmed" is not necessarily the equivalent of "confirmed plan," and that had Congress intended the latter, it would have used that language, as it did in a related Code provision. See § 1142(b) (referring to "any instrument required to effect a transfer of property dealt with by a confirmed plan"). Piccadilly also argues that "under" is just as easily read to mean "in accordance with." It observes that the variability of the term "under" is well documented, noting that the American Heritage Dictionary 1395 (1976) provides 15 definitions, including "[i]n view of," "because of," "by virtue of," as well as "[s]ubject to the restraint . . . of." See also *Ardestani*, *supra*, at 135 (recognizing that "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context"). Although "under" appears several times in § 1146(a), Piccadilly maintains there is no reason why a term of such common usage and variable meaning must have the same meaning each time it is used, even in the same sentence. As an illustration, it points to § 302(a) of the Bankruptcy Code, which states, "The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter." Piccadilly contends that this provision is best read as: "The commencement of a joint case *subject to the provisions of* a chapter of this title constitutes an order for relief *in* such chapter." Piccadilly thus concludes that the statutory text—standing alone—is susceptible of more than one interpretation. See *Hechinger*, *supra*, at 253 ("[W]e cannot say that the language of [§ 1146(a)] rules out the possibility that 'under a plan confirmed' means 'in agreement with a plan confirmed' ").

While both sides present credible interpretations of § 1146(a), Florida has the better one. To be sure, Congress could have used more precise language—*i. e.*, "under a plan *that has been* confirmed"—and thus removed all ambiguity. But the two readings of the language that Congress chose are not equally plausible: Of the two, Florida's is clearly the more natural. The interpretation advanced by Piccadilly and adopted by the Eleventh Circuit—that there must be "some nexus between the pre-confirmation transfer and the confirmed plan" for § 1146(a) to apply, 484 F. 3d, at 1304—places greater strain on the statutory text than the simpler construction advanced by Florida and adopted by the Third and Fourth Circuits.

Furthermore, Piccadilly's emphasis on the distinction between "plan confirmed" and "confirmed plan" is unavailing because § 1146(a) specifies not only that a tax-exempt transfer be "under a plan," but also that the plan in question be confirmed pursuant to § 1129. Congress' placement of "plan confirmed" before "under section 1129" avoids the ambiguity that would have arisen had it used the term "confirmed plan," which could easily be read to mean that the transfer must be "under section 1129" rather than under a plan that was itself confirmed under § 1129.

Although we agree with Florida that the more natural reading of § 1146(a) is that the exemption applies only to postconfirmation transfers, ultimately we need not decide whether the statute is unambiguous on its face. Even assuming, *arguendo*, that the language of § 1146(a) is facially ambiguous, the ambiguity must be resolved in Florida's favor. We reach this conclusion after considering the parties' other arguments, to which we now turn.

B

Piccadilly insists that, whatever the degree of ambiguity on its face, § 1146(a) becomes even more ambiguous when

read in context with other Bankruptcy Code provisions. Piccadilly asserts that if Congress had intended § 1146(a) to apply exclusively to transfers occurring after confirmation, it would have made its intent plain with an express temporal limitation similar to those appearing elsewhere in the Code. For example, § 1127 governs modifications to a Chapter 11 plan, providing that the proponent of a plan may modify the plan "at any time before confirmation," or, subject to certain restrictions, "at any time after confirmation of such plan." §§ 1127(a)–(b). Similar examples abound. See, *e. g.*, § 1104(a) ("[a]t any time after the commencement of the case but before confirmation of a plan . . . "); § 1104(c) ("at any time before the confirmation of a plan . . . "). Piccadilly emphasizes that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted). Because Congress did not impose a clear and commonly used temporal limitation in § 1146(a), Piccadilly concludes that Congress did not intend one to exist. Piccadilly buttresses its conclusion by pointing out that § 1146(b)—the subsection immediately following § 1146(a)—includes an express temporal limitation. See § 1146(b) (2000 ed., Supp. V) (providing that a bankruptcy court may declare certain tax consequences after the date a government unit responds to a plan proponent's request or "270 days after such request," whichever is earlier). But Congress included no such limitation in subsection (a).

Piccadilly also relies on other Code provisions to bolster its argument that the term "under" preceding "a plan confirmed" in § 1146(a) should be read broadly—to mean "in accordance with" rather than the narrower "authorized by." Apart from § 302, discussed above, Piccadilly adverts to § 111, which states that an agency providing credit counseling to debtors is required to meet "the standards set forth

under this section." § 111(b)(4)(A) (2000 ed., Supp. V). Piccadilly argues that this language requires the agency to meet "the standards set forth *in* this section," because reading the quoted language to mean "the standards set forth *authorized by* this section" would render the words "set forth" nonsensical. Piccadilly additionally refers to § 303(a), which provides that "[a]n involuntary case may be commenced only under chapter 7 or 11 of this title." Again, Piccadilly asserts that this language means "an involuntary case may be commenced only *in* chapter 7 or 11 of this title." It reasons that "under" in § 303(a) cannot mean "authorized by" because § 303(a) itself authorizes involuntary cases, and the provisions of Chapters 7 and 11 do not. Piccadilly makes a similar argument with respect to § 343, which provides that "[t]he debtor shall appear and submit to examination under oath at the meeting of creditors." Reading "under" to mean "authorized by" would make little sense here. On the basis of these examples, Piccadilly concludes that the term "under" is ambiguous.

Finally, Piccadilly maintains that "under" in § 1146(a) should be construed broadly in light of § 365(g)(1) of the Bankruptcy Code, which provides that rejection of an executory contract or unexpired lease constitutes the equivalent of a prebankruptcy breach "if such contract or lease has not been assumed under this section or under a plan confirmed under chapter . . . 11." In *Hechinger*, the Third Circuit concluded that substituting "authorized by" for "under" in § 1146(a) would be consistent with the use of the parallel language in § 365(g)(1). 335 F. 3d, at 254. Piccadilly attempts to refute *Hechinger*'s reading of § 365(g)(1), asserting that, because authorization for the assumption of a lease under a plan is described in § 1123(b)(2), which "circles back to section 365," such authorization cannot be "subject to" or "authorized by" Chapter 11. Brief for Respondent 39 (emphasis deleted); see 11 U. S. C. § 1123(b)(2) (providing that "a plan may . . . subject to section 365 of this title, provide for the

assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section"). The phrase "under a plan confirmed" in §365(g)(1), contends Piccadilly, is thus best read to mean "*in accordance with* a plan confirmed" because a plan may provide for the assumption of an executory contract or unexpired lease but not—unlike §365—be the ultimate authority for that assumption. As a result, Piccadilly concludes that the identical language of §1146(a) should have the same meaning.

Piccadilly supports this point with its assertion that, unlike sales, postconfirmation assumptions or rejections are not permitted under the Bankruptcy Code. See *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 529 (1984) (stating that in "a Chapter 11 reorganization, a debtor-in-possession has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract"). Because, as Piccadilly contends, the phrase "under a plan confirmed under chapter . . . 11" in §365(g)(1) cannot refer to assumptions or rejections occurring after confirmation, it would be anomalous to read the identical phrase in §1146(a) to cover *only* postconfirmation transfers.

For its part, Florida argues that the statutory context of §1146(a) supports its position that the stamp-tax exemption applies exclusively to postconfirmation transfers. It observes that the subchapter in which §1146(a) appears is entitled, "POSTCONFIRMATION MATTERS." Florida contends that, while not dispositive, the placement of a provision in a particular subchapter suggests that its terms should be interpreted consistent with that subchapter. See *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). In addition, Florida dismisses Piccadilly's references to the temporal limitations in other Code provisions on the ground that it would have been superfluous for Congress to add any fur-

ther limitations to § 1146(a)'s already unambiguous temporal element.

Even on the assumption that the text of § 1146(a) is ambiguous, we are not persuaded by Piccadilly's contextual arguments. As noted above, Congress could have used language that made § 1146(a)'s temporal element clear beyond question. Unlike § 1146(a), however, the temporal language examples quoted by Piccadilly are indispensable to the operative meaning of the provisions in which they appear. Piccadilly's reliance on § 1127, for example, is misplaced because that section explicitly differentiates between preconfirmation modifications, see § 1127(a), and postconfirmation modifications, which are permissible "only if circumstances warrant" them, § 1127(b). It was unnecessary for Congress to include in § 1146(a) a phrase such as "at any time after confirmation of such plan" because the phrase "under a plan confirmed" is most naturally read to require that there be a confirmed plan at the time of the transfer.

Even if we were to adopt Piccadilly's broad definition of "under," its interpretation of the statute faces other obstacles. The asset transfer here can hardly be said to have been consummated "in accordance with" any confirmed plan because, as of the closing date, Piccadilly had not even submitted its plan to the Bankruptcy Court for confirmation. Piccadilly's asset sale was thus not conducted "in accordance with" any plan confirmed under Chapter 11. Rather, it was conducted "in accordance with" the procedures set forth in Chapter 3—specifically, § 363(b)(1). To read the statute as Piccadilly proposes would make § 1146(a)'s exemption turn on whether a debtor-in-possession's actions are consistent with a legal instrument that does not exist—and indeed may not even be conceived of—at the time of the sale. Reading § 1146(a) in context with other relevant Code provisions, we find nothing justifying such a curious interpretation of what is a straightforward exemption.

Nor does anything in § 365(g)(1) recommend Piccadilly's reading of § 1146(a). Section 365(g) generally allows a

trustee to reject "an executory contract or unexpired lease of the debtor," *i. e.*, to reject a contract that is unfavorable to the estate, subject to court approval. As the text makes clear, such approval may occur either under "this section," §365(g)—*i. e.*, "at any time before the confirmation of a plan," §365(d)(2)—or "under a plan confirmed under chapter 9, 11, 12, or 13," §365(g)(1). Piccadilly relies heavily on *Bildisco*, *supra*, in which this Court held that §365 permits a debtor-in-possession to reject a collective-bargaining agreement like any other executory contract, and that doing so is not an unfair labor practice under the National Labor Relations Act. In reaching this conclusion, the Court observed that "a debtor-in-possession has until a reorganization plan is confirmed *to decide* whether to accept or reject an executory contract." 465 U. S., at 529 (emphasis added).

We agree with *Bildisco*'s commonsense observation that the *decision* whether to reject a contract or lease must be made before confirmation. But that in no way undermines the fact that the rejection takes *effect* upon or after confirmation of the Chapter 11 plan (or before confirmation if pursuant to §365(d)(2)). In the context of §1146(a), the decision whether to transfer a given asset "under a plan confirmed" must be made prior to submitting the Chapter 11 plan to the bankruptcy court, but the transfer itself cannot be "under a plan confirmed" until the court confirms the plan in question. Only at that point does the transfer become eligible for the stamp-tax exemption.[3]

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[3] Also meritless is Piccadilly's argument that "under" in the phrase "under a plan confirmed under chapter . . . 11" in §365(g)(1) cannot be read to mean "subject to" because §1123(b)(2), in Piccadilly's words, "circles back to section 365." Brief for Respondent 39 (emphasis deleted). Section 1123(b)(2) authorizes a plan to provide for the assumption, rejection, or assignment of an executory contract or unexpired lease, but requires that the plan do so in a manner consistent with the various requirements set forth throughout §365. By contrast, the phrase "under this section" in §365(g)(1) serves as a reference to §365(d)(2), which permits preconfirmation assumptions and rejections pursuant to a court order (and not, as in §1123(b)(2), pursuant to a confirmed plan).

If the statutory context suggests anything, it is that § 1146(a) is inapplicable to preconfirmation transfers. We find it informative that Congress placed § 1146(a) in a subchapter entitled, "POSTCONFIRMATION MATTERS." To be sure, a subchapter heading cannot substitute for the operative text of the statute. See, *e. g.*, *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) ("'[T]he title of a statute . . . cannot limit the plain meaning of the text'"). Nonetheless, statutory titles and section headings "'are tools available for the resolution of a doubt about the meaning of a statute.'" *Porter* v. *Nussle*, 534 U. S. 516, 528 (2002). The placement of § 1146(a) within a subchapter expressly limited to postconfirmation matters undermines Piccadilly's view that § 1146(a) covers preconfirmation transfers.

But even if we were fully to accept Piccadilly's textual and contextual arguments, they would establish at most that the statutory language is ambiguous. They do not—and largely are not intended to—demonstrate that § 1146(a)'s purported ambiguity should be resolved in Piccadilly's favor. Florida argues that various nontextual canons of construction require us to resolve any ambiguity in its favor. Piccadilly responds with substantive canons of its own. It is to these dueling canons of construction that we now turn.

C

Florida contends that even if the statutory text is deemed ambiguous, applicable substantive canons compel its interpretation of § 1146(a). Florida first invokes the canon that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). Florida observes that the relevant language of § 1146(a) relating to "under a plan confirmed" has remained unchanged since 1978 despite several revisions of the Bankruptcy Code. The most recent revision in 2005 occurred after the Fourth Circuit's decision in *NVR* and the Third Circuit's decision in *Hech-*

inger but before the Eleventh Circuit's decision below. Florida asserts that Congress ratified this longstanding interpretation when, in its most recent amendments to the Code, it "readopted" the stamp-tax provision verbatim as § 1146(a). Brief for Petitioner 26.

Florida also invokes the substantive canon—on which the Third Circuit relied in *Hechinger*—that courts should " 'proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed.' " 335 F. 3d, at 254 (quoting *California State Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U. S. 844, 851–852 (1989)). In light of this directive, Florida contends that § 1146(a)'s language must be construed strictly in favor of the States to prevent unwarranted displacement of their tax laws. See *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U. S. 582, 590 (1995) (discussing principles of comity in taxation and the "federal reluctance to interfere with state taxation" given the "strong background presumption against interference").

Furthermore, Florida notes that the canon also discourages federal interference with the administration of a State's taxation scheme. See *id.*, at 586, 590. Florida contends that the Court of Appeals' extension of § 1146(a) to preconfirmation transfers directly interferes with the administration of the State's stamp tax, which is imposed "prior to recordation" of the instrument of transfer. Fla. Stat. §§ 201.01, 201.02(1) (2006). Extending the exemption to transfers that occurred months or years before a confirmable plan even existed, Florida explains, may require the States to " 'unravel' " stamp taxes already collected. Brief for Petitioner 31. Alternatively, should a court grant an exemption under § 1146(a) before confirmation, States would be saddled with the task of monitoring whether the plan is ever eventually confirmed.

In response, Piccadilly contends that the federalism principle articulated in *Sierra Summit*, *supra*, at 852, does not

apply where there is a "clear expression of an exemption from state taxation" overriding a State's authority to tax. In Piccadilly's view, that is precisely the case with regard to § 1146(a), which proscribes the imposition of stamp taxes and demonstrates Congress' intent to exempt a category of state taxation.

Piccadilly further maintains that Florida's stamp tax is nothing more than a postpetition claim, specifically an administrative expense, which is paid as a priority claim ahead of the prepetition claims of most creditors. Equating Florida's receipt of tax revenue with a preference in favor of a particular claimant, Piccadilly argues that § 1146(a)'s ambiguous exemption should not be construed to diminish other claimants' recoveries. See *Howard Delivery Service, Inc.* v. *Zurich American Ins. Co.*, 547 U. S. 651, 667 (2006) (emphasizing that "provisions allowing preferences must be tightly construed"). Reading the stamp-tax exemption too narrowly, Piccadilly maintains, "'is not only inconsistent with the policy of equality of distribution'" but also "'dilutes the value of the priority for those creditors Congress intended to prefer'"—those with prepetition claims. Brief for Respondent 54 (quoting *Howard Delivery Serv.*, *supra*, at 667).

Above all, Piccadilly urges us to adopt the Court of Appeals' maxim that "a remedial statute such as the Bankruptcy Code should be liberally construed." 484 F. 3d, at 1304; cf. *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 782 (1952). In Piccadilly's view, any ambiguity in the statutory text is overshadowed by § 1146(a)'s obvious purpose: to facilitate the Chapter 11 process "through giving tax relief." *In re Jacoby-Bender, Inc.*, 758 F. 2d 840, 841 (CA2 1985). Piccadilly characterizes the tax on asset transfers at issue here as tantamount to a levy on the bankruptcy process itself. A stamp tax like Florida's makes the sale of a debtor's property more expensive and reduces the total proceeds available to satisfy the creditors' claims, contrary to Congress' clear intent in enacting § 1146(a).

What is unclear, Piccadilly argues, is why "Congress would have intended the anomaly that a transfer essential to a plan that occurs two minutes before confirmation may be taxed, but the same transfer occurring two seconds after may not." Brief for Respondent 43. After all, interpreting § 1146(a) in the manner Florida proposes would lead precisely to that result. And that, Piccadilly asserts, is "absurd" in light of § 1146(a)'s policy aim—evidenced by the provision's text and legislative history—of reducing the cost of asset transfers. In that vein, Piccadilly contends that interpreting § 1146(a) to apply solely to postconfirmation transfers would undermine Chapter 11's twin objectives of "preserving going concerns and maximizing property available to satisfy creditors." *Bank of America Nat. Trust and Sav. Assn.* v. *203 North LaSalle Street Partnership*, 526 U. S. 434, 453 (1999). In order to obtain the maximum value for its assets—especially assets rapidly declining in value—Piccadilly claims that a debtor often must close the sale before formal confirmation of the Chapter 11 plan.

We agree with Florida that the federalism canon articulated in *Sierra Summit* and elsewhere obliges us to construe § 1146(a)'s exemption narrowly. Piccadilly's effort to evade the canon falls well short of the mark because reading § 1146(a) in the manner Piccadilly proposes would require us to do exactly what the canon counsels against. If we recognized an exemption for preconfirmation transfers, we would in effect be " 'recogniz[ing] an exemption from state taxation that *Congress has not clearly expressed*' "—namely, an exemption for preconfirmation transfers. *Sierra Summit*, *supra*, at 851–852 (emphasis added); see also *Swarts* v. *Hammer*, 194 U. S. 441, 444 (1904) (reasoning that if Congress endeavored to exempt a debtor from state and local taxation, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt"). Indeed, Piccadilly proves precisely this point by resting its entire

case on the premise that Congress has expressed its stamp-tax exemption in ambiguous language. Therefore, far from being inapposite, the canon is decisive in this case.

The canons on which Piccadilly relies are inapposite. While we agree with Piccadilly that "provisions allowing preferences must be tightly construed," *Howard Delivery Serv.*, *supra*, at 667, § 1146(a) is not a preference-granting provision. The statutory text makes no mention of preferences.

Nor are we persuaded that in this case we should construe § 1146(a) "liberally" to serve its ostensibly "remedial" purpose. Based on the Eleventh Circuit's declaration that the Bankruptcy Code is a "remedial statute," Piccadilly would stretch the disallowance well beyond what the statutory text can naturally bear. Apart from the opinion below, however, the only authority Piccadilly offers is a 1952 decision of this Court interpreting the Shipping Commissioners Act of 1872. See Brief for Respondent 54 (citing *Isbrandtsen*, *supra*, at 782). But unlike the statutory scheme in *Isbrandtsen*, which was "'designed to secure the comfort and health of seamen aboard ship, hospitalization at home and care abroad,'" 343 U. S., at 784 (quoting *Aguilar* v. *Standard Oil Co. of N. J.*, 318 U. S. 724, 728–729 (1943)), the Bankruptcy Code—and Chapter 11 in particular—is not a remedial statute in that sense. To the contrary, this Court has rejected the notion that "Congress had a single purpose in enacting Chapter 11." *Toibb* v. *Radloff*, 501 U. S. 157, 163 (1991). Rather, Chapter 11 strikes a balance between a debtor's interest in reorganizing and restructuring its debts and the creditors' interest in maximizing the value of the bankruptcy estate. *Ibid.* The Code also accommodates the interests of the States in regulating property transfers by "'generally [leaving] the determination of property rights in the assets of a bankrupt's estate to state law.'" *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 450–451 (2007). Such interests often do not coincide,

and in this case, they clearly do not. We therefore decline to construe the exemption granted by § 1146(a) to the detriment of the State.

As for Piccadilly's assertion that reading § 1146(a) to allow preconfirmation transfers to be taxed while exempting others moments later would amount to an "absurd" policy, we reiterate that "'it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.'" *Hechinger*, 335 F. 3d, at 256. That said, we see no absurdity in reading § 1146(a) as setting forth a simple, bright-line rule instead of the complex, after-the-fact inquiry Piccadilly envisions. At bottom, we agree with the Fourth Circuit's summation of § 1146(a):

> "Congress struck a most reasonable balance. If a debtor is able to develop a Chapter 11 reorganization and obtain confirmation, then the debtor is to be afforded relief from certain taxation to facilitate the implementation of the reorganization plan. Before a debtor reaches this point, however, the state and local tax systems may not be subjected to federal interference." *NVR*, 189 F. 3d, at 458.

Lastly, to the extent the "practical realities" of Chapter 11 reorganizations are increasingly rendering postconfirmation transfers a thing of the past, see 484 F. 3d, at 1304, it is incumbent upon the Legislature, and not the Judiciary, to determine whether § 1146(a) is in need of revision. See, *e. g.*, *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 228 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable").

III

The most natural reading of § 1146(a)'s text, the provision's placement within the Code, and applicable substantive canons all lead to the same conclusion: Section 1146(a) affords a stamp-tax exemption only to transfers made pursuant to a

Chapter 11 plan that has been confirmed. Because Piccadilly transferred its assets before its Chapter 11 plan was confirmed by the Bankruptcy Court, it may not rely on § 1146(a) to avoid Florida's stamp taxes. Accordingly, we reverse the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

The Bankruptcy Code provides that the "transfer" of an asset "*under a plan confirmed under section 1129 of this title*, may not be taxed under any law imposing a stamp tax or similar tax." 11 U. S. C. § 1146(a) (2000 ed., Supp. V) (previously § 1146(c)) (emphasis added). In this case, the debtor's reorganization "plan" provides for the "transfer" of assets. But the "plan" itself was not "confirmed under section 1129 of this title" (*i. e.*, the Bankruptcy Judge did not formally approve the plan) until *after* the "transfer" of assets took place. See § 1129 (2000 ed. and Supp. V) (detailing the requirements for bankruptcy court approval of a Chapter 11 plan).

Hence we must ask whether the time of transfer matters. Do the statutory words "under a plan confirmed under section 1129 of this title" apply only where a transfer takes place "under a plan" that at the time of the transfer *already has been* "confirmed under section 1129 of this title"? Or, do they also apply where a transfer takes place "under a plan" that *subsequently is* "confirmed under section 1129 of this title"? The Court concludes that the statutory phrase applies only where a transfer takes place "under a plan" that at the time of transfer *already has been* "confirmed under section 1129 of this title." In my view, however, the statutory phrase applies "under a plan" that at the time of transfer either *already has been* or *subsequently is* "confirmed." In a word, the majority believes that the time (pre- or post-

transfer) at which the bankruptcy judge confirms the reorganization plan matters. I believe that it does not. (And construing the provision to refer to a plan that simply "is" confirmed would require us to read fewer words into the statute than the Court's construction, which reads the provision to refer only to a plan "that has been" confirmed, *ante*, at 53.)

The statutory language itself is perfectly ambiguous on the point. Linguistically speaking, it is no more difficult to apply the words "plan confirmed" to instances in which the "plan" *subsequently is* "confirmed" than to restrict their application to instances in which the "plan" *already has been* "confirmed." See *In re Piccadilly Cafeterias, Inc.*, 484 F. 3d 1299, 1304 (CA11 2007) *(per curiam)* ("[T]he statute can plausibly be read either as describing eligible transfers to include transfers 'under a plan confirmed' regardless of *when* the plan is confirmed, *or* . . . imposing a temporal restriction on when the confirmation of the plan must occur" (emphasis in original)). Cf. *In re Hechinger Inv. Co. of Del.*, 335 F. 3d 243, 252–253 (CA3 2003) (majority opinion of Alito, J.) (noting more than one "plausible interpretation"); *In re NVR, LP*, 189 F. 3d 442, 458 (CA4 1999) (Wilkinson, J., concurring in part and concurring in judgment) ("equally possible that the provision requires only that the transfer occur 'under'—i. e., that it be inferior or subordinate to—'a plan' that is ultimately 'confirmed' "). But cf. *ante*, at 41 (majority believes its reading is "clearly the more natural").

Nor can I find any text-based argument that points clearly in one direction rather than the other. Indeed, the majority, after methodically combing the textualist beaches, finds that a comparison with other somewhat similar phrases in the Bankruptcy Code sheds little light. For example, on the one hand, if Congress thought the time of confirmation mattered, why did it not say so expressly as it has done elsewhere in the Code? See, *e. g.*, 11 U. S. C. § 1127(b) (plan proponent may modify it "at any time *after* confirmation" (emphasis

added)); § 1104(a) ("[a]t any time after the commencement of the case but *before* confirmation" (emphasis added)); § 1104(c) ("at any time *before* the confirmation of a plan" (emphasis added)); § 1114(e)(2) ("*before* a plan confirmed under section 1129 of this title is effective" (emphasis added)). On the other hand, if Congress thought the time of confirmation did *not* matter, why did it place this provision in a subchapter entitled "POSTCONFIRMATION MATTERS"? See 11 U. S. C., ch. 11, subch. III. (And yet one could also argue that the tax-exemption provision appears under the "postconfirmation matters" title because the trigger for the exemption is plan confirmation. Thus, the exemption is a "postconfirmation matter," regardless of when the transfer occurs.)

The canons of interpretation offer little help. And the majority, for the most part, seems to agree. It ultimately rests its interpretive conclusion upon this Court's statement that courts "must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed." *California State Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U. S. 844, 851–852 (1989) (internal quotation marks omitted). See *ante*, at 50–51. But when, as here, we interpret a provision the *express point of which* is to exempt some category of state taxation, how can the statement in *Sierra Summit* prove determinative? See § 1146(a) ("The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, *may not be taxed* under any law imposing a stamp tax or similar tax" (emphasis added)).

Neither does Florida's related claim, protesting federal interference in the *administration* of a State's taxation scheme, seem plausible. See Brief for Petitioner 32–33 (noting the "additional difficulties and complexities that will proliferate" under the lower court's decision). *If* Florida now requires transferees to file a *pre-existing* confirmed plan in

order to avoid payment of the stamp tax, then why could Florida not require a transferee under a not-yet-confirmed plan to pay the stamp tax and then file the plan after its confirmation in order to obtain a refund? (If there is some other, less curable, practical problem, Florida has not explained what it is.) Given these difficulties, I suspect that the majority's reliance upon *Sierra Summit*'s "canon," *ante*, at 48, reflects no more than an effort to find the proverbial "any port" in this interpretive storm.

The absence of a clear answer in text or canons, however, should not lead us to judicial despair. Consistent with Court precedent, we can and should ask a further question: *Why* would Congress have insisted upon temporal limits? What reasonable *purpose* might such limits serve? See, *e. g.*, *Dolan* v. *Postal Service*, 546 U. S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, *considering the purpose* and context of the statute, and consulting any precedents or authorities that inform the analysis" (emphasis added)); *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 346 (1997) (the Court's construction of a statute's meaning based in part on its consideration of the statute's "*primary purpose*" (emphasis added)). In fact, the majority's reading of temporal limits in § 1146(a) serves *no reasonable congressional purpose at all.*

The statute's purpose is apparent on its face. It seeks to further Chapter 11's basic objectives: (1) "preserving going concerns" and (2) "maximizing property available to satisfy creditors." *Bank of America Nat. Trust and Sav. Assn.* v. *203 North LaSalle Street Partnership*, 526 U. S. 434, 453 (1999). See also *Toibb* v. *Radloff*, 501 U. S. 157, 163 (1991) (Chapter 11 "embodies the general [Bankruptcy] Code policy of maximizing the value of the bankruptcy estate"). As an important bankruptcy treatise notes, "[i]n addition to tax relief, the purpose of the exemption of [§ 1146(a)] is to encourage and facilitate bankruptcy asset sales." 8 Collier on Bankruptcy ¶ 1146.02, p. 1146–3 (rev. 15th ed. 2005). It fur-

thers these objectives where, *e. g.*, asset transfers are at issue, by turning over to the estate (for the use of creditors or to facilitate reorganization) funds that otherwise would go to pay state stamp taxes on plan-related transferred assets. The requirement that the transfers take place pursuant to a reorganization "plan" that is "confirmed" provides the bankruptcy judge's assurance that the transfer meets with creditor approval and the requirements laid out in § 1129.

How would the majority's temporal limitation further these statutory objectives? It would not do so in any way. From the perspective of these purposes, it makes no difference whether a transfer takes place before or after the plan is confirmed. In both instances the exemption puts in the hands of the creditors or the estate money that would otherwise go to the State in the form of a stamp tax. In both instances the confirmation of the related plan ensures the legitimacy (from bankruptcy law's perspective) of the plan that provides for the assets transfer.

Moreover, one major reason why a transfer may take place *before* rather than *after* a plan is confirmed is that the preconfirmation bankruptcy process takes time. As the Administrative Office of the United States Courts recently reported, "[a] Chapter 11 case may continue for many years." Bankruptcy Basics (Apr. 2006), online at http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter11.html (as visited June 13, 2008, and available in Clerk of Court's case file). Accord, *In re Hechinger Inv. Co. of Del.*, 254 B. R. 306, 320 (Bkrtcy. Ct. Del. 2000) (noting it may run "a year or two"). And a firm (or its assets) may have more value (say, as a going concern) where sale takes place quickly. As the District Court in this case acknowledged, "there are times when it is more advantageous for the debtor to begin to sell as many assets as quickly as possible in order to insure that the assets do not lose value." *In re Piccadilly Cafeterias, Inc.*, 379 B. R. 215, 224 (SD Fla. 2006) (internal quotation marks and alteration omitted). See, *e. g.*, *In re Webster Classic*

Auctions, Inc., 318 B. R. 216, 219 (Bkrtcy. Ct. MD Fla. 2004) (recognizing "the inestimable benefit to a Chapter 11 estate to sell a piece of property at the most opportune time—whether pre- or postconfirmation—as opposed to requiring all concerned to wait for a postconfirmation sale in order to receive the tax relief Congress obviously intended"); *In re Medical Software Solutions*, 286 B. R. 431, 441 (Bkrtcy. Ct. Utah 2002) (approving preconfirmation sale of debtor's assets recognizing that the assets' "value is reducing rapidly" and there was only a narrow window for a viable sale of the assets). Thus, an immediate sale can often make more revenue available to creditors or for reorganization of the remaining assets. Stamp taxes on related transfers simply reduce the funds available for any such legitimate purposes. And insofar as the Court's interpretation of the statute reduces the funds made available, that interpretation inhibits the statute's efforts to achieve its basic objectives.

Worse than that, if the potential loss of stamp tax revenue threatens delay in implementing any such decision to sell, then creditors (or the remaining reorganized enterprise) could suffer far more serious harm. They could lose the extra revenues that a speedy sale might otherwise produce. See, *e. g.*, *In re Met-L-Wood Corp.*, 861 F. 2d 1012, 1017 (CA7 1988) (as suppliers and customers "shy away," it can make sense quickly to sell business to other owners so that it "can continue" to operate "free of the stigma and uncertainty of bankruptcy"). In the present case, for example, Piccadilly, by selling assets quickly after strategic negotiation, realized $80 million, considerably more than the $54 million originally offered before Piccadilly filed for bankruptcy. That fact, along with the Bankruptcy Court's finding of "sound business reasons" for the prompt sale of Piccadilly's assets and that the expeditious sale was "in the best interests of creditors of [Piccadilly] and other parties in interest," App. 32a, ¶9, suggest that considerably less would have been available for

creditors had Piccadilly waited until after the plan's confirmation to execute the sale plan.

What conceivable reason could Congress have had for silently writing into the statute's language a temporal distinction with such consequences? The majority can find none. It simply says that the result is not "'absurd'" and notes the advantages of a "bright-line rule." *Ante*, at 52. I agree that the majority's interpretation is not absurd and do not dispute the advantages of a clear rule. But I think the statute supplies a clear enough rule—transfers are exempt when there is confirmation and are not exempt when there is no confirmation. And I see no reason to adopt the majority's preferred construction (that only transfers completed after plan confirmation are exempt), where it conflicts with the statute's purpose.

Of course, we should not substitute "'"*our view* of . . . policy"'" for the statute that Congress enacted. *Ibid.* (emphasis added). But we certainly should consider *Congress'* view of the policy for the statute it created, and that view inheres in the statute's purpose. "Statutory interpretation is not a game of blind man's bluff. Judges are free to consider statutory language in light of a statute's basic purposes." *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 484 (2003) (BREYER, J., concurring in part and dissenting in part). It is the majority's failure to work with this important tool of statutory interpretation that has led it to construe the present statute in a way that, in my view, runs contrary to what Congress would have hoped for and expected.

For these reasons, I respectfully dissent.

Syllabus

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA ET AL. *v.* BROWN, ATTORNEY GENERAL OF CALIFORNIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–939. Argued March 19, 2008—Decided June 19, 2008

Organizations whose members do business with California sued to enjoin enforcement of "Assembly Bill 1889" (AB 1889), which, among other things, prohibits employers that receive state grants or more than $10,000 in state program funds per year from using the funds "to assist, promote, or deter union organizing." Cal. Govt. Code Ann. §§ 16645.2(a), 16645.7(a). The District Court granted the plaintiffs partial summary judgment, holding that the National Labor Relations Act (NLRA) pre-empts §§ 16645.2 and 16645.7 because they regulate employer speech about union organizing under circumstances in which Congress intended free debate. The Ninth Circuit reversed, concluding that Congress did not intend to preclude States from imposing such restrictions on the use of their own funds.

Held: Sections 16645.2 and 16645.7 are pre-empted by the NLRA. Pp. 64–76.

(a) The NLRA contains no express pre-emption provision, but this Court has held pre-emption necessary to implement federal labor policy where, *inter alia*, Congress intended particular conduct to "be unregulated because left 'to be controlled by the free play of economic forces.'" *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 140. Pp. 64–66.

(b) Sections 16645.2 and 16645.7 are pre-empted under *Machinists* because they regulate within "a zone protected and reserved for market freedom." *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U. S. 218, 227. In 1947, the Taft-Hartley Act amended the NLRA by, among other things, adding § 8(c), which protects from National Labor Relations Board (NLRB) regulation noncoercive speech by both unions and employers about labor organizing. The section both responded to prior NLRB rulings that employers' attempts to persuade employees not to organize amounted to coercion prohibited as an unfair labor practice by the previous version of § 8 and manifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 62. Congress' express protection of free debate

forcefully buttresses the pre-emption analysis in this case. California's policy judgment that partisan employer speech necessarily interferes with an employee's choice about union representation is the same policy judgment that Congress renounced when it amended the NLRA to preclude regulation of noncoercive speech as an unfair labor practice. To the extent §§ 16645.2 and 16645.7 actually further AB 1889's express goal, they are unequivocally pre-empted. Pp. 66–69.

(c) The Ninth Circuit's reasons for concluding that *Machinists* did not pre-empt §§ 16645.2 and 16645.7—(1) that AB 1889's spending restrictions apply only to the *use* of state funds, not to their *receipt;* (2) that Congress did not leave the zone of activity free from *all* regulation, in that the NLRB still regulates employer speech on the eve of union elections; and (3) that California modeled AB 1889 on federal statutes, *e. g.*, the Workforce Investment Act—are not persuasive. Pp. 69–76.

463 F. 3d 1076, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 76.

Willis J. Goldsmith argued the cause for petitioners. With him on the briefs were *Michael A. Carvin*, *Noel J. Francisco*, *Luke A. Sobota*, *Robin S. Conrad*, *Shane Brennan*, *Steven J. Law*, and *Stephen A. Bokat*.

Deputy Solicitor General Hungar argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Clement*, *Nicole A. Saharsky*, *Ronald Meisburg*, *John H. Ferguson*, and *Linda Dreeben*.

Michael Gottesman argued the cause for respondents. On the brief for state respondents were *Edmund G. Brown, Jr.*, Attorney General of California, *pro se*, *Janet Gaard*, Chief Assistant Attorney General, *Manuel M. Medeiros*, Solicitor General, *Gordon Burns*, Deputy Solicitor General, *Louis Verdugo, Jr.*, Senior Assistant Attorney General, and *Richard T. Waldow* and *Angela Sierra*, Supervising Deputy Attorneys General. *Stephen P. Berzon*, *Scott A. Kronland*, and *Jonathan P. Hiatt* filed a brief for respondent American

Federation of Labor and Congress of Industrial Organizations et al.*

JUSTICE STEVENS delivered the opinion of the Court.

A California statute known as "Assembly Bill 1889" (AB 1889) prohibits several classes of employers that receive state funds from using the funds "to assist, promote, or deter union organizing." See Cal. Govt. Code Ann. §§ 16645–16649 (West Supp. 2008). The question presented to us is whether two of its provisions—§ 16645.2, applicable to grant recipients, and § 16645.7, applicable to private employers receiving more than $10,000 in program funds in any year—are pre-empted by federal law mandating that certain zones of labor activity be unregulated.

I

As set forth in the preamble, the State of California enacted AB 1889 for the following purpose:

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*Briefs of *amici curiae* urging reversal were filed for the American Hospital Association by *F. Curt Kirschner, Jr.*, and *Irving L. Gornstein;* for Associated Builders and Contractors, Inc., et al. by *Maurice Baskin, Robert Fried,* and *Thomas Lenz;* for the Cato Institute by *Ilya Shapiro;* and for the Healthcare Association of New York State, Inc., et al. by *Jeffrey J. Sherrin, Cornelius D. Murray,* and *James A. Shannon.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Andrew M. Cuomo,* Attorney General of New York, *Barbara D. Underwood,* Solicitor General, *Benjamin N. Gutman,* Deputy Solicitor General, and *Sasha Samberg-Champion,* Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Bill McCollum* of Florida, *Lisa Madigan* of Illinois, *Thomas Miller* of Iowa, *Jack Conway* of Kentucky, *G. Steven Rowe* of Maine, *Martha Coakley* of Massachusetts, *Lori Swanson* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Catherine Cortez Masto* of Nevada, *Gary G. King* of New Mexico, *Marc Dann* of Ohio, *Hardy Myers* of Oregon, *Patrick C. Lynch* of Rhode Island, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; and for AARP et al. by *Amy Howe, Kevin K. Russell, Pamela S. Karlan,* and *Jeffrey L. Fisher.*

Glenn M. Taubman filed a brief for the National Right to Work Legal Defense Foundation, Inc., et al. as *amici curiae.*

> "It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization and to prohibit an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract." 2000 Cal. Stats. ch. 872, § 1.

AB 1889 prohibits certain employers that receive state funds—whether by reimbursement, grant, contract, use of state property, or pursuant to a state program—from using such funds to "assist, promote, or deter union organizing." See Cal. Govt. Code Ann. §§ 16645.1 to 16645.7. This prohibition encompasses "any attempt by an employer to influence the decision of its employees" regarding "[w]hether to support or oppose a labor organization" and "[w]hether to become a member of any labor organization." § 16645(a). The statute specifies that the spending restriction applies to "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for . . . an activity to assist, promote, or deter union organizing." § 16646(a).

Despite the neutral statement of policy quoted above, AB 1889 expressly exempts "activit[ies] performed" or "expense[s] incurred" in connection with certain undertakings that promote unionization, including "[a]llowing a labor organization or its representatives access to the employer's facilities or property," and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." §§ 16647(b), (d).

To ensure compliance with the grant and program restrictions at issue in this case, AB 1889 establishes a formidable enforcement scheme. Covered employers must certify that no state funds will be used for prohibited expenditures; the

employer must also maintain and provide upon request "records sufficient to show that no state funds were used for those expenditures." §§ 16645.2(c), 16645.7(b)–(c). If an employer commingles state and other funds, the statute presumes that any expenditures to assist, promote, or deter union organizing derive in part from state funds on a pro rata basis. § 16646(b). Violators are liable to the State for the amount of funds used for prohibited purposes plus a civil penalty equal to twice the amount of those funds. §§ 16645.2(d), 16645.7(d). Suspected violators may be sued by the state attorney general or any private taxpayer, and prevailing plaintiffs are "entitled to recover reasonable attorney's fees and costs." § 16645.8(d).

II

In April 2002, several organizations whose members do business with the State of California (collectively, Chamber of Commerce) brought this action against the California Department of Health Services and appropriate state officials (collectively, the State) to enjoin enforcement of AB 1889. Two labor unions (collectively, AFL–CIO) intervened to defend the statute's validity.

The District Court granted partial summary judgment in favor of the Chamber of Commerce,[1] holding that the National Labor Relations Act (NLRA or Wagner Act), 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, pre-empts Cal. Govt. Code Ann. § 16645.2 (concerning grants) and § 16645.7 (concerning program funds) because those provisions "regulat[e] employer speech about union organizing under specified circumstances, even though Congress intended free debate." *Chamber of Commerce* v. *Lockyer*, 225 F. Supp. 2d 1199, 1205 (CD Cal. 2002). The Court of Appeals for the Ninth Circuit,

[1] The District Court held that the Chamber of Commerce lacked standing to challenge several provisions of AB 1889 concerning state contractors and public employers. See *Chamber of Commerce* v. *Lockyer*, 225 F. Supp. 2d 1199, 1202–1203 (CD Cal. 2002).

after twice affirming the District Court's judgment, granted rehearing en banc and reversed. See *Chamber of Commerce* v. *Lockyer*, 463 F. 3d 1076, 1082 (2006). While the en banc majority agreed that California enacted §§ 16645.2 and 16645.7 in its capacity as a regulator, and not as a mere proprietor or market participant, see *id.*, at 1082–1085, it concluded that Congress did not intend to preclude States from imposing such restrictions on the use of their own funds, see *id.*, at 1085–1096. We granted certiorari, 552 U. S. 1035 (2007), and now reverse.

Although the NLRA itself contains no express pre-emption provision, we have held that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy. The first, known as *Garmon* pre-emption, see *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp.* v. *Los Angeles*, 475 U. S. 608, 613 (1986) *(Golden State I)*. To this end, *Garmon* pre-emption forbids States to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 286 (1986). The second, known as *Machinists* pre-emption, forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended "be unregulated because left 'to be controlled by the free play of economic forces.'" *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 140 (1976) (quoting *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971)). *Machinists* pre-emption is based on the premise that "'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" 427 U. S., at 140, n. 4 (quoting Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1352 (1972)).

Today we hold that §§ 16645.2 and 16645.7 are pre-empted under *Machinists* because they regulate within "a zone protected and reserved for market freedom." *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U. S. 218, 227 (1993) *(Boston Harbor)*. We do not reach the question whether the provisions would also be pre-empted under *Garmon*.

III

As enacted in 1935, the NLRA, which was commonly known as the Wagner Act, did not include any provision that specifically addressed the intersection between employee organizational rights and employer speech rights. See 49 Stat. 449. Rather, it was left to the NLRB, subject to review in federal court, to reconcile these interests in its construction of §§ 7 and 8. Section 7, now codified at 29 U. S. C. § 157, provided that workers have the right to organize, to bargain collectively, and to engage in concerted activity for their mutual aid and protection. Section 8(1), now codified at 29 U. S. C. § 158(a)(1), made it an "unfair labor practice" for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Among the frequently litigated issues under the Wagner Act were charges that an employer's attempts to persuade employees not to join a union—or to join one favored by the employer rather than a rival—amounted to a form of coercion prohibited by § 8. The NLRB took the position that § 8 demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the § 7 rights of employees. See 1 J. Higgins, The Developing Labor Law 94 (5th ed. 2006). In 1941, this Court curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibits an employer "from expressing its view on labor policies or problems" unless the employer's speech "in connection with other circumstances [amounts] to coercion within

the meaning of the Act." *NLRB* v. *Virginia Elec. & Power Co.*, 314 U. S. 469, 477. We subsequently characterized *Virginia Electric* as recognizing the First Amendment right of employers to engage in noncoercive speech about unionization. *Thomas* v. *Collins*, 323 U. S. 516, 537–538 (1945). Notwithstanding these decisions, the NLRB continued to regulate employer speech too restrictively in the eyes of Congress.

Concerned that the Wagner Act had pushed the labor relations balance too far in favor of unions, Congress passed the Labor Management Relations Act, 1947 (Taft-Hartley Act). 61 Stat. 136. The Taft-Hartley Act amended §§ 7 and 8 in several key respects. First, it emphasized that employees "have the right to refrain from any or all" § 7 activities. 29 U. S. C. § 157. Second, it added § 8(b), which prohibits unfair labor practices by unions. 29 U. S. C. § 158(b). Third, it added § 8(c), which protects speech by both unions and employers from regulation by the NLRB. 29 U. S. C. § 158(c). Specifically, § 8(c) provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

From one vantage, § 8(c) "merely implements the First Amendment," *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 617 (1969), in that it responded to particular constitutional rulings of the NLRB. See S. Rep. No. 80–105, pt. 2, pp. 23–24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 62 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correct-

ing the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "free-wheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers* v. *Austin*, 418 U. S. 264, 272–273 (1974).

Congress' express protection of free debate forcefully buttresses the pre-emption analysis in this case. Under *Machinists*, congressional intent to shield a zone of activity from regulation is usually found only "implicit[ly] in the structure of the Act," *Livadas* v. *Bradshaw*, 512 U. S. 107, 117, n. 11 (1994), drawing on the notion that "'[w]hat Congress left unregulated is as important as the regulations that it imposed,'" *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 110 (1989) *(Golden State II)* (quoting *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U. S. 519, 552 (1979) (Powell, J., dissenting)). In the case of noncoercive speech, however, the protection is both implicit and explicit. Sections 8(a) and 8(b) demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. Moreover, the amendment to § 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization. Finally, the addition of § 8(c) expressly precludes regulation of speech about unionization "so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Gissel Packing*, 395 U. S., at 618.

The explicit direction from Congress to leave noncoercive speech unregulated makes this case easier, in at least one respect, than previous NLRA cases because it does not require us "to decipher the presumed intent of Congress in the face of that body's steadfast silence." *Sears, Roebuck & Co.*

v. *Carpenters*, 436 U. S. 180, 188, n. 12 (1978). California's policy judgment that partisan employer speech necessarily "interfere[s] with an employee's choice about whether to join or to be represented by a labor union," 2000 Cal. Stats. ch. 872, § 1, is the same policy judgment that the NLRB advanced under the Wagner Act, and that Congress renounced in the Taft-Hartley Act. To the extent §§ 16645.2 and 16645.7 actually further the express goal of AB 1889, the provisions are unequivocally pre-empted.

IV

The Court of Appeals concluded that *Machinists* did not pre-empt §§ 16645.2 and 16645.7 for three reasons: (1) The spending restrictions apply only to the *use* of state funds, (2) Congress did not leave the zone of activity free from *all* regulation, and (3) California modeled AB 1889 on federal statutes. We find none of these arguments persuasive.

Use of State Funds

In NLRA pre-emption cases, "'judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'" *Golden State I*, 475 U. S., at 614, n. 5 (quoting *Garmon*, 359 U. S., at 243; brackets omitted); see also *Livadas*, 512 U. S., at 119 ("Pre-emption analysis . . . turns on the actual content of [the State's] policy and its real effect on federal rights"). California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.

In *Gould*, we held that Wisconsin's policy of refusing to purchase goods and services from three-time NLRA violators was pre-empted under *Garmon* because it imposed a "supplemental sanction" that conflicted with the NLRA's "'integrated scheme of regulation.'" 475 U. S., at 288–289.

Wisconsin protested that its debarment statute was "an exercise of the State's spending power rather than its regulatory power," but we dismissed this as "a distinction without a difference." *Id.*, at 287. "[T]he point of the statute [was] to deter labor law violations," and "for all practical purposes" the spending restriction was "tantamount to regulation." *Id.*, at 287–289. Wisconsin's choice "to use its spending power rather than its police power d[id] not significantly lessen the inherent potential for conflict" between the state and federal schemes; hence the statute was pre-empted. *Id.*, at 289.

We distinguished *Gould* in *Boston Harbor*, holding that the NLRA did not preclude a state agency supervising a construction project from requiring that contractors abide by a labor agreement. We explained that when a State acts as a "market participant with no interest in setting policy," as opposed to a "regulator," it does not offend the pre-emption principles of the NLRA. 507 U. S., at 229. In finding that the state agency had acted as a market participant, we stressed that the challenged action "was specifically tailored to one particular job," and aimed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.*, at 232.

It is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant. AB 1889 is neither "specifically tailored to one particular job" nor a "legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U. S., at 291. As the statute's preamble candidly acknowledges, the legislative purpose is not the efficient procurement of goods and services, but the furtherance of a labor policy. See 2000 Cal. Stats. ch. 872, § 1. Although a State has a legitimate proprietary interest in ensuring that state funds are spent in accordance with the purposes for which they are appropriated, this is not the objective of AB 1889. In contrast to a neutral affirmative requirement that funds be spent solely

for the purposes of the relevant grant or program, AB 1889 imposes a targeted negative restriction on employer speech about unionization. Furthermore, the statute does not even apply this constraint uniformly. Instead of forbidding the use of state funds for *all* employer advocacy regarding unionization, AB 1889 permits use of state funds for *select* employer advocacy activities that promote unions. Specifically, the statute exempts expenses incurred in connection with, *inter alia*, giving unions access to the workplace, and voluntarily recognizing unions without a secret ballot election. §§ 16647(b), (d).

The Court of Appeals held that although California did not act as a market participant in enacting AB 1889, the NLRA did not pre-empt the statute. It purported to distinguish *Gould* on the theory that AB 1889 does not make employer neutrality a condition for *receiving* funds, but instead restricts only the *use* of funds. According to the Court of Appeals, this distinction matters because when a State imposes a "use" restriction instead of a "receipt" restriction, "an employer has and retains the freedom to spend its own funds however it wishes." 463 F. 3d, at 1088.

California's reliance on a "use" restriction rather than a "receipt" restriction is, at least in this case, no more consequential than Wisconsin's reliance on its spending power rather than its police power in *Gould*. As explained below, AB 1889 couples its "use" restriction with compliance costs and litigation risks that are calculated to make union-related advocacy prohibitively expensive for employers that receive state funds. By making it exceedingly difficult for employers to demonstrate that they have not used state funds and by imposing punitive sanctions for noncompliance, AB 1889 effectively reaches beyond "the use of funds over which California maintains a sovereign interest." Brief for State Respondents 19.

Turning first to the compliance burdens, AB 1889 requires recipients to "maintain records sufficient to show that

no state funds were used" for prohibited expenditures, §§ 16645.2(c), 16645.7(c), and conclusively presumes that any expenditure to assist, promote, or deter union organizing made from "commingled" funds constitutes a violation of the statute, § 16646(b). Maintaining "sufficient" records and ensuring segregation of funds is no small feat, given that AB 1889 expansively defines its prohibition to encompass "any expense" incurred in "any attempt" by an employer to "influence the decision of its employees." §§ 16645(a), 16646(a). Prohibited expenditures include not only discrete expenses such as legal and consulting fees, but also an allocation of overhead, including "salaries of supervisors and employees," for any time and resources spent on union-related advocacy. See § 16646(a). The statute affords no clearly defined safe harbor, save for expenses incurred in connection with activities that either favor unions or are required by federal or state law. See § 16647.

The statute also imposes deterrent litigation risks. Significantly, AB 1889 authorizes not only the California attorney general but also any private taxpayer—including, of course, a union in a dispute with an employer—to bring a civil action against suspected violators for "injunctive relief, damages, civil penalties, and other appropriate equitable relief." § 16645.8. Violators are liable to the State for three times the amount of state funds deemed spent on union organizing. §§ 16645.2(d), 16645.7(d), 16645.8(a). Prevailing plaintiffs, and certain prevailing taxpayer intervenors, are entitled to recover attorney's fees and costs, § 16645.8(d), which may well dwarf the treble damages award. Consequently, a trivial violation of the statute could give rise to substantial liability. Finally, even if an employer were confident that it had satisfied the recordkeeping and segregation requirements, it would still bear the costs of defending itself against unions in court, as well as the risk of a mistaken adverse finding by the factfinder.

In light of these burdens, California's reliance on a "use" restriction rather than a "receipt" restriction "does not significantly lessen the inherent potential for conflict" between AB 1889 and the NLRA. *Gould*, 475 U. S., at 289. AB 1889's enforcement mechanisms put considerable pressure on an employer either to forgo his "free speech right to communicate his views to his employees," *Gissel Packing*, 395 U. S., at 617, or else to refuse the receipt of any state funds. In so doing, the statute impermissibly "predicat[es] benefits on refraining from conduct protected by federal labor law," *Livadas*, 512 U. S., at 116, and chills one side of "the robust debate which has been protected under the NLRA," *Letter Carriers*, 418 U. S., at 275.

Resisting this conclusion, the State and the AFL–CIO contend that AB 1889 imposes less onerous recordkeeping restrictions on governmental subsidies than do federal restrictions that have been found not to violate the First Amendment. See *Rust* v. *Sullivan*, 500 U. S. 173 (1991); *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983). The question, however, is not whether AB 1889 violates the First Amendment, but whether it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the NLRA. *Livadas*, 512 U. S., at 120 (quoting *Brown* v. *Hotel Employees*, 468 U. S. 491, 501 (1984)). Constitutional standards, while sometimes analogous, are not tailored to address the object of labor preemption analysis: giving effect to Congress' intent in enacting the Wagner and Taft-Hartley Acts. See *Livadas*, 512 U. S., at 120 (distinguishing standards applicable to the Equal Protection and Due Process Clauses); *Gould*, 475 U. S., at 290 (Commerce Clause); *Linn*, 383 U. S., at 67 (First Amendment). Although a State may "choos[e] to fund a program dedicated to advance certain permissible goals," *Rust*, 500 U. S., at 194, it is not "permissible" for a State to use its spending power to advance an interest that—even if legitimate "in the absence of the NLRA," *Gould*, 475 U. S., at

290—frustrates the comprehensive federal scheme established by that Act.

NLRB Regulation

We have characterized *Machinists* pre-emption as "creat[ing] a zone free from all regulations, whether state or federal." *Boston Harbor*, 507 U. S., at 226. Stressing that the NLRB has regulated employer speech that takes place on the eve of union elections, the Court of Appeals deemed *Machinists* inapplicable because "employer speech in the context of organizing" is not a zone of activity that Congress left free from "*all* regulation." See 463 F. 3d, at 1089 (citing *Peoria Plastic Co.*, 117 N. L. R. B. 545, 547–548 (1957) (barring employer interviews with employees in their homes immediately before an election); *Peerless Plywood Co.*, 107 N. L. R. B. 427, 429 (1953) (barring employers and unions alike from making election speeches on company time to massed assemblies of employees within the 24-hour period before an election)).

The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA, 29 U. S. C. § 159. Whatever the NLRB's regulatory authority within special settings such as imminent elections, however, Congress has clearly denied it the authority to regulate the broader category of noncoercive speech encompassed by AB 1889. It is equally obvious that the NLRA deprives California of this authority, since "'[t]he States have no more authority than the Board to upset the balance that Congress has struck between labor and management.'" *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 751 (1985).

Federal Statutes

Finally, the Court of Appeals reasoned that Congress could not have intended to pre-empt AB 1889 because Congress itself has imposed similar restrictions. See 463 F. 3d, at 1090–1091. Specifically, three federal statutes include

provisions that forbid the use of particular grant and program funds "to assist, promote, or deter union organizing."[2] We are not persuaded that these few isolated restrictions, plucked from the multitude of federal spending programs, were either intended to alter or did in fact alter the "'wider contours of federal labor policy.'" *Metropolitan Life*, 471 U. S., at 753.

A federal statute will contract the pre-emptive scope of the NLRA if it demonstrates that "Congress has decided to tolerate a substantial measure of diversity" in the particular regulatory sphere. *New York Telephone*, 440 U. S., at 546 (plurality opinion). In *New York Telephone*, an employer challenged a state unemployment system that provided benefits to employees absent from work during lengthy strikes. The employer argued that the state system conflicted with the federal labor policy "of allowing the free play of economic forces to operate during the bargaining process." *Id.*, at 531. We upheld the statute on the basis that the legislative histories of the NLRA and the Social Security Act, which were enacted within six weeks of each other, confirmed that "Congress intended that the States be free to authorize, or to prohibit, such payments." *Id.*, at 544; see also *id.*, at 547 (Brennan, J., concurring in result); *id.*, at 549 (Blackmun, J., concurring in judgment). Indeed, the tension between the Social Security Act and the NLRA suggested that the case could "be viewed as presenting a potential conflict between two federal statutes . . . rather than between federal and state regulatory statutes." *Id.*, at 539–540, n. 32.

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[2] See 29 U. S. C. §2931(b)(7) ("Each recipient of funds under [the Workforce Investment Act of 1998] shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing"); 42 U. S. C. §9839(e) ("Funds appropriated to carry out [the Head Start Programs Act] shall not be used to assist, promote, or deter union organizing"); §12634(b)(1) ("Assistance provided under [the National Community Service Act of 1990] shall not be used by program participants and program staff to . . . assist, promote, or deter union organizing").

The three federal statutes relied on by the Court of Appeals neither conflict with the NLRA nor otherwise establish that Congress "decided to tolerate a substantial measure of diversity" in the regulation of employer speech. Unlike the States, Congress has the authority to create tailored exceptions to otherwise applicable federal policies, and (also unlike the States) it can do so in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor policies. Consequently, the mere fact that Congress has imposed targeted federal restrictions on union-related advocacy in certain limited contexts does not invite the States to override federal labor policy in other settings.

Had Congress enacted a federal version of AB 1889 that applied analogous spending restrictions to *all* federal grants or expenditures, the pre-emption question would be closer. Cf. *Metropolitan Life*, 471 U. S., at 755 (citing federal minimum labor standards as evidence that Congress did not intend to pre-empt state minimum labor standards). But none of the cited statutes is Governmentwide in scope, none contains comparable remedial provisions, and none contains express pro-union exemptions.

* * *

The Court of Appeals' judgment reversing the summary judgment entered for the Chamber of Commerce is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

California's spending statute sets forth a state "policy" not to "subsidize efforts by an employer to assist, promote, or deter union organizing." 2000 Cal. Stats. ch. 872, § 1. The operative sections of the law prohibit several classes of em-

ployers who receive state funds from using those funds to "assist, promote, or deter union organizing." Cal. Govt. Code Ann. §§ 16645–16649 (West Supp. 2008). And various compliance provisions then require maintenance of "records sufficient to show that no state funds were used" for prohibited expenditures, deter the use of commingled funds for prohibited expenditures, and impose serious penalties upon violators. §§ 16645.2(c), 16645.7(b)–(c).

The Court finds that the National Labor Relations Act (NLRA) pre-empts these provisions. It does so, for it believes the provisions "*regulate*" activity that Congress has intended to "be unregulated because left to be controlled by the free play of economic forces." *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 140 (1976) (internal quotation marks omitted; emphasis added). The Chamber of Commerce adds that the NLRA pre-empts these provisions because they "*regulate* activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 286 (1986) (summarizing the pre-emption principle set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959); emphasis added). Thus the question before us is whether California's spending limitations amount to *regulation* that the NLRA pre-empts. In my view, they do not.

I

The operative sections of the California statute provide that employers who wish to "assist, promote, or deter union organizing" cannot use state money when they do so. The majority finds these provisions pre-empted because in its view the sections regulate employer speech in a manner that weakens, or undercuts, a congressional policy, embodied in NLRA § 8(c), "'to encourage free debate on issues dividing labor and management.'" *Ante*, at 67 (quoting *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 62 (1966)).

Although I agree the congressional policy favors "free debate," I do not believe the operative provisions of the California statute amount to impermissible regulation that interferes with that policy as Congress intended it. First, the only relevant Supreme Court case that found a State's labor-related spending limitations to be pre-empted differs radically from the case before us. In that case, *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, the Court considered a Wisconsin statute that prohibited the State from doing business with firms that repeatedly violated the NLRA. The Court said that the statute's "manifest purpose and inevitable effect" was "to enforce" the NLRA's requirements, which "role Congress reserved exclusively for the [National Labor Relations Board]." *Id.*, at 291. In a word, the Wisconsin statute sought "to *compel* conformity with the NLRA." *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U. S. 218, 228 (1993) (emphasis added).

California's statute differs from the Wisconsin statute because it does not seek to compel labor-related activity. Nor does it seek to forbid labor-related activity. It permits all employers who receive state funds to "assist, promote, or deter union organizing." It simply says to those employers, do not do so on our dime. I concede that a federal law that forces States to pay for labor-related speech from public funds would encourage *more* of that speech. But no one can claim that the NLRA is such a law. And without such a law, a State's refusal to pay for labor-related speech does not *impermissibly* discourage that activity. To refuse to pay for an activity (as here) is not the same as to compel others to engage in that activity (as in *Gould*).

Second, California's operative language does not weaken or undercut Congress' policy of "encourag[ing] free debate on issues dividing labor and management." *Linn*, *supra*, at 62. For one thing, employers remain free to spend *their own* money to "assist, promote, or deter" unionization. More im-

portantly, I cannot conclude that California's statute would weaken or undercut any such congressional policy because Congress itself has enacted three statutes that, *using identical language*, do precisely the same thing. Congress has forbidden recipients of Head Start funds to use the funds to "assist, promote, or deter union organizing." 42 U. S. C. § 9839(e). It has forbidden recipients of Workforce Investment Act of 1998 funds to use the funds to "assist, promote, or deter union organizing." 29 U. S. C. § 2931(b)(7). And it has forbidden recipients of National Community Service Act of 1990 funds to use the funds to "assist, promote, or deter union organizing." 42 U. S. C. § 12634(b)(1). Could Congress have thought that the NLRA would prevent the States from enacting the very same kinds of laws that Congress itself has enacted? Far more likely, Congress thought that directing government funds away from labor-related activity was *consistent*, not *inconsistent*, with the policy of "encourag[ing] free debate" embedded in its labor statutes.

Finally, the law normally gives legislatures broad authority to decide how to spend the people's money. A legislature, after all, generally has the right *not* to fund activities that it would prefer not to fund—even where the activities are otherwise protected. See, *e. g.*, *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 549 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right"). This Court has made the same point in the context of labor law. See *Lyng* v. *Automobile Workers*, 485 U. S. 360, 368 (1988) (holding that the Federal Government's refusal to provide food stamp benefits to striking workers was justified because "[s]trikers and their union would be much better off if food stamps were available," but the "strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right").

As far as I can tell, States that *do* wish to pay for employer speech are generally free to do so. They might make clear, for example, through grant-related rules and regulations that a grant recipient can use the funds to pay salaries and overhead, which salaries and overhead might include expenditures related to management's role in labor organizing contests. If so, why should States that do *not* wish to pay be deprived of a similar freedom? Why should they be conscripted into paying?

I can find nothing in the majority's arguments that convincingly answers these questions. The majority says that California *must* be acting as an impermissible regulator because it is not acting as a "market participant" (a role we all agree would permit it broad leeway to act like private firms in respect to labor matters). *Ante*, at 70. But the regulator/market-participant distinction suggests a false dichotomy. The converse of "market participant" is not necessarily "regulator." A State may appropriate funds without either participating in or regulating the labor market. And the NLRA pre-empts a State's actions, when taken as an "appropriator," only if those actions amount to impermissible regulation. I have explained why I believe that California's actions do not amount to impermissible regulation here.

The majority also complains that the statute "imposes a targeted negative restriction," one applicable only to labor. *Ante*, at 71. I do not find this a fatal objection, because the congressional statutes just discussed (which I believe are consistent with the NLRA) do exactly the same. In any event, if, say, a State can tell employers not to use state funds to pay for a large category of expenses (say, overhead), why can it not tell employers the same about a smaller category of expenses (say, only those overhead expenses related to taking sides in a labor contest). And where would the line then be drawn? Would the statute pass muster if California had said, do not use our money to pay for interior decorating, catered lunches, or labor relations?

The majority further objects to the fact that the statute does not "apply" the constraint "uniformly," because it permits use of state funds for "*select* employer advocacy activities that promote unions." *Ante*, at 71. That last phrase presumably refers to an exception in the California statute that permits employers to spend state funds to negotiate a voluntary recognition of a union. But this exception underscores California's basic purpose—maintaining a position of spending neutrality on *contested* labor matters. Where labor and management agree on unionization, there is no conflict.

II

I turn now to the statute's compliance provisions. They require grant recipients to maintain "records sufficient to show that no state funds were used" for prohibited expenditures; they deter the use of commingled funds for prohibited expenditures; and they impose serious penalties upon violators. Cal. Govt. Code Ann. §§ 16645.2(c), 16645.7(b)–(c). The majority seems to rest its conclusions in part upon its belief that these requirements are too strict, that, under the guise of neutral enforcement, they discourage the use of *nonstate* money to engage in free debate on labor/management issues. *Ante*, at 71.

I agree with the majority that, should the compliance provisions, as a practical matter, unreasonably discourage expenditure of *nonstate* funds, the NLRA may well pre-empt California's statute. But I cannot say on the basis of the record before us that the statute will have that effect.

The language of the statute is clear. The statute requires recipients of state money to "maintain records sufficient to show that no state funds were used" for prohibited expenditures. §§ 16645.2, 16645.7(c). And the class of prohibited expenditures is quite broad: It covers "*any* expense" incurred in "any attempt" by an employer to "influence the decision of its employees," including "legal and consulting fees and salaries of supervisors and employees" incurred

during research for or the preparation, planning, coordination, or execution of activities to "assist, promote, or deter" union organizing. § 16646(a) (emphasis added). And where an employer mingles state funds and nonstate funds (say, to pay a particular employee who spends part of her time dealing with unionization matters) the employer must determine "on a pro rata basis," the portion of the labor-related expenditure paid for by state funds, and maintain sufficient supporting documentation. § 16646(b). Any violation of these provisions is then subject to strict penalties, including treble damages and attorney's fees and costs. § 16645.8.

What is less clear is the degree to which these provisions actually will deter a recipient of state funds from using nonstate funds to engage in unionization matters. And no lower court has ruled on this matter. In the District Court, the Chamber of Commerce moved for summary judgment arguing that the statute, by placing restrictions on state funds, was pre-empted by *Machinists* and *Garmon* and also arguing that the compliance provisions are so burdensome that they would chill even private expenditures. California opposed the motion. And California submitted expert evidence designed to show that its "accounting and recordkeeping requirements . . . are similar to requirements imposed in other contexts," are "significantly less burdensome than the detailed requirements for federal grant recipients," and allow "flexibility in establishing proper accounting procedures and controls." App. 282–283.

The District Court granted the Chamber of Commerce's motion for summary judgment in part, finding that the operative sections of the statute were pre-empted for the reasons I have discussed in Part I, namely, that the operative provisions interfered with the NLRA's policy of encouraging "free debate." 225 F. Supp. 2d 1199, 1204 (CD Cal. 2002). But in doing so, it did not address the Chamber of Commerce's argument that the California statute's compliance provisions affected non-state-funded speech to the point that the NLRA

pre-empted the statute. Neither did the Court of Appeals address the question whether the compliance provisions themselves constitute sufficient grounds for finding the statute pre-empted.

I do not believe that we can, and I would not, decide this question until the lower courts have had an opportunity to consider and rule upon the compliance-related questions. Accordingly, I would vote to vacate the judgment of the Ninth Circuit and remand for further proceedings on this issue.

I respectfully dissent.

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MEACHAM ET AL. *v.* KNOLLS ATOMIC POWER LABORATORY, AKA KAPL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 06–1505. Argued April 23, 2008—Decided June 19, 2008

When the National Government ordered its contractor, respondent Knolls, to reduce its work force, Knolls had its managers score their subordinates on "performance," "flexibility," and "critical skills"; these scores, along with points for years of service, were used to determine who was laid off. Of the 31 employees let go, 30 were at least 40 years old. Petitioners (Meacham, for short) were among those laid off, and they filed this suit asserting, *inter alia*, a disparate-impact claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.* To show such an impact, Meacham relied on a statistical expert's testimony that results so skewed according to age could rarely occur by chance; and that the scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes. The jury found for Meacham on the disparate-impact claim, and the Second Circuit initially affirmed. This Court vacated the judgment and remanded in light of its intervening decision in *Smith* v. *City of Jackson*, 544 U. S. 228. The Second Circuit then held for Knolls, finding its prior ruling untenable because it had applied a "business necessity" standard rather than a "reasonableness" test in assessing the employer's reliance on factors other than age in the layoff decisions, and because Meacham had not carried the burden of persuasion as to the reasonableness of Knolls's non-age factors.

Held: An employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" (RFOA) affirmative defense under §623(f)(1). Pp. 91–102.

(a) The ADEA's text and structure indicate that the RFOA exemption creates an affirmative defense, for which the burden of persuasion falls on the employer. The RFOA exemption is listed alongside one for bona fide occupational qualifications (BFOQ), which the Court has recognized to be an affirmative defense: "It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) . . . where age is a [BFOQ] reasonably necessary to the normal operation of the particular business, or where the differentiation is based on [RFOA] . . . ." §623(f)(1). Given that the statute

lays out its exemptions in a provision separate from the general prohibitions in §§623(a)–(c), (e), and expressly refers to the prohibited conduct as such, it is no surprise that this Court has spoken of both the BFOQ and RFOA as being among the ADEA's "five affirmative defenses," *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 122. This reading follows the familiar principle that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it," *Javierre* v. *Central Altagracia*, 217 U. S. 502, 508. As this longstanding convention is part of the backdrop against which the Congress writes laws, the Court respects it unless there is compelling reason to think that Congress put the burden of persuasion on the other side. See *Schaffer* v. *Weast*, 546 U. S. 49, 57–58. The Court has given this principle particular weight in enforcing the Fair Labor Standards Act of 1938 (FLSA), *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 196–197; and it has also recognized that "the ADEA [is] enforced in accordance with the 'powers, remedies, and procedures' of the FLSA," *Lorillard* v. *Pons*, 434 U. S. 575, 580. Nothing in §623(f)(1) suggests that Congress meant it to march out of step with either the general or specifically FLSA default rules placing the burden of proving an exemption on the party claiming it. Any further doubt would be dispelled by the natural implication of the "otherwise prohibited" language prefacing the BFOQ and RFOA defenses. Pp. 91–95.

(b) Knolls argues that because the RFOA clause bars liability where action is taken for reasons "other than age," it should be read as mere elaboration on an element of liability. But *City of Jackson* confirmed that §623(a)(2)'s prohibition extends to practices with a disparate impact, inferring this result in part from the presence of the RFOA provision. 544 U. S., at 239, 243. And *City of Jackson* made it clear that action based on a "factor other than age" is the very premise for disparate-impact liability, not a negation of it or a defense to it. Thus, it is assumed that a non-age factor was at work in such a case, and the focus of the RFOA defense is on whether the factor relied on was "reasonable." Pp. 95–96.

(c) The business necessity test has no place in ADEA disparate-impact cases; applying both that test and the RFOA defense would entail a wasteful and confusing structure of proof. The absence of a business necessity enquiry does not diminish, however, the reasons already given for reading the RFOA as an affirmative defense. *City of Jackson* cannot be read as implying that the burden of proving any business-related defense falls on the plaintiff, for it confirmed that the BFOQ is an affirmative defense, see 544 U. S., at 233, n. 3. Moreover, in referring to "*Wards Cove*'s . . . interpretation of . . . identical language [in Title VII]," *City of Jackson* could not have had the RFOA clause in

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mind, for Title VII has no like-worded defense. And as *Wards Cove* did not purport to construe any Title VII defenses, only an over-reading of *City of Jackson* would find in it an assumption that *Wards Cove* has anything to say about statutory defenses in the ADEA. Pp. 97–100.

(d) *City of Jackson* confirmed that an ADEA disparate-impact plaintiff must "'"isolat[e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities."'" 544 U. S., at 241. This is not a trivial burden, and it ought to allay some of the concern that recognizing an employer's burden of persuasion on an RFOA defense will encourage strike suits or nudge plaintiffs with marginal cases into court; but in the end, such concerns have to be directed at Congress, which set the balance by both creating the RFOA exemption and writing it in the orthodox format of an affirmative defense. Pp. 100–102.

461 F. 3d 134, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, and ALITO, JJ., joined, and in which THOMAS, J., joined as to Parts I and II–A. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 102. THOMAS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 104. BREYER, J., took no part in the consideration or decision of the case.

Kevin K. Russell argued the cause for petitioners. With him on the briefs were *Amy Howe*, *Pamela S. Karlan*, *John B. DuCharme*, and *Joseph C. Berger*.

Daryl Joseffer argued the cause for the United States as *amicus curiae* urging reversal. On the brief were former *Solicitor General Clement*, *Acting Solicitor General Garre*, *Leondra R. Kruger*, *Ronald S. Cooper*, *Carolyn L. Wheeler*, and *Barbara L. Sloan*.

Seth P. Waxman argued the cause for respondents. With him on the brief were *Paul R. Q. Wolfson*, *Heather M. Zachary*, *Anthony M. Deardurff*, *Margaret A. Clemens*, and *John E. Higgins*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *Patricia A. Millett*, *Donald R. Livingston*, *Robin S. Conrad*, and *Shane Brennan*; for the Employment and Labor Law Committee of the Association of Corporate Counsel by *David E. Nagle*; for the Equal Employment Advisory Council

JUSTICE SOUTER delivered the opinion of the Court.

A provision of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.*, creates an exemption for employer actions "otherwise prohibited" by the ADEA but "based on reasonable factors other than age" (RFOA). §623(f)(1). The question is whether an employer facing a disparate-impact claim and planning to defend on the basis of RFOA must not only produce evidence raising the defense, but also persuade the factfinder of its merit. We hold that the employer must do both.

I

The National Government pays private companies to do some of the work maintaining the Nation's fleet of nuclear-powered warships. One such contractor is respondent KAPL, Inc. (Knolls), the operator of the Government's Knolls Atomic Power Laboratory, which has a history dating back to the first nuclear-powered submarines in the 1950s. The United States Navy and the Department of Energy jointly fund Knolls's operations, decide what projects it should pursue, and set its annual staffing limits. In recent years, Knolls has been charged with designing prototype naval nuclear reactors and with training Navy personnel to run them.

The demands for naval nuclear reactors changed with the end of the Cold War, and for fiscal year 1996 Knolls was ordered to reduce its work force. Even after 100 or so employees chose to take the company's ensuing buyout offer,

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et al. by *Rae T. Vann*, *Karen R. Harned*, and *Elizabeth Milito;* for General Electric Co. by *Peter Buscemi;* and for the National School Boards Association by *Maree F. Sneed*, *John W. Borkowski*, *Audrey J. Anderson*, *Thomas B. Leary*, *Gil A. Abramson*, *Francisco M. Negron, Jr.*, *Thomas E. M. Hutton*, and *Lisa E. Soronen*.

Laurie A. McCann, *Melvin Radowitz*, and *Paul W. Mollica* filed a brief for AARP et al. as *amici curiae*.

Knolls was left with 30-some jobs to cut.[1] Petitioners (Meacham, for short) are among those laid off in the resulting "involuntary reduction in force." Brief for Petitioners 6. In order to select those for layoff, Knolls told its managers to score their subordinates on three scales, "performance," "flexibility," and "critical skills."[2] The scores were summed, along with points for years of service, and the totals determined who should be let go.

Of the 31 salaried employees laid off, 30 were at least 40 years old.[3] Twenty-eight of them sued, raising both disparate-treatment (discriminatory intent) and disparate-impact (discriminatory result) claims under the ADEA and state law, alleging that Knolls "designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees." *Meacham* v. *Knolls Atomic Power Laboratory*, 381 F. 3d 56, 61 (CA2 2004) *(Meacham I)*. To show a disparate impact, the workers relied on a statistical expert's testimony to the effect that results so skewed according to age could rarely occur

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[1] The naval reactors program had lowered Knolls's staffing limit by 108 people; as Knolls also had to hire 35 new employees for work existing personnel could not do, a total of 143 jobs would have to go.

[2] The "performance" score was based on the worker's two most recent appraisals. The "flexibility" instruction read: "Rate the employee's flexibility within the Laboratory. Can his or her documented skills be used in other assignments that will add value to current or future Lab work? Is the employee retrainable for other Lab assignments?" The "critical skills" instruction read: "How critical are the employee's skills to continuing work in the Lab? Is the individual's skill a *key* technical resource for the [naval reactors] program? Is the skill readily accessible within the Lab or generally available from the external market?" App. 94–95 (emphasis in original).

[3] For comparison: after the voluntary buyouts, 1,203 out of 2,063 salaried workers (or 58%) were at least 40 years old; and of the 245 who were at risk of involuntary layoff, and therefore included in the rankings scheme, 179 (or 73%) were 40 or over. *Meacham* v. *Knolls Atomic Power Laboratory*, 185 F. Supp. 2d 193, 203 (NDNY 2002).

by chance;[4] and that the scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes. *Id.*, at 65.

The jury found for Meacham on the disparate-impact claim (but not on the disparate-treatment claim). The Court of Appeals affirmed, after examining the verdict through the lens of the so-called "burden shifting" scheme of inference spelled out in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989). See *Meacham I*, *supra*, at 74–76.[5] After Knolls sought certiorari, we vacated the judgment and remanded for further proceedings in light of *Smith* v. *City of Jackson*, 544 U. S. 228 (2005), decided while Knolls's petition was pending, see 544 U. S. 957 (2005).

On remand, the same Court of Appeals panel ruled in favor of Knolls, over a dissent. 461 F. 3d 134 (CA2 2006) *(Meacham II)* (case below). The majority found its prior ruling "untenable" because it had applied the *Wards Cove* "business necessity" standard rather than a "reasonableness" test, contrary to *City of Jackson;* and on the latter standard, Meacham, the employee, had not carried the burden of persuasion. 461 F. 3d, at 140–141, 144 (internal quotation marks

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[4]The expert cut the data in different ways, showing the chances to be 1 in 348,000 (based on a population of all 2,063 salaried workers); 1 in 1,260 (based on a population of the 245 workers at risk of layoff); or 1 in 6,639 (when the analysis was broken down by sections of the company). *Meacham I*, 381 F. 3d, at 64–65.

[5]Taking the *Wards Cove* steps in turn, the Court of Appeals concluded that the "jury could have found that the degree of subjective decision making allowed in the [layoff procedure] created the disparity," 381 F. 3d, at 74; that the employer had answered with evidence of a "facially legitimate business justification," a need "to reduce its workforce while still retaining employees with skills critical to the performance of [Knolls's] functions," *ibid.* (internal quotation marks omitted); and that petitioners would prevail nonetheless because "[a]t least one suitable alternative is clear from the record," that Knolls "could have designed [a procedure] with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias," *id.*, at 75.

omitted).[6] In dissent, Judge Pooler took issue with the majority for confusing business justifications under *Wards Cove* with the statutory RFOA exemption, which she read to be an affirmative defense with the burden of persuasion falling on defendants. 461 F. 3d, at 147, 149–152.[7]

Meacham sought certiorari, noting conflicting decisions assigning the burden of persuasion on the reasonableness of the factor other than age; the Court of Appeals in this case placed it on the employee (to show the non-age factor unreasonable), but the Ninth Circuit in *Criswell* v. *Western Airlines, Inc.*, 709 F. 2d 544, 552 (1983), had assigned it to the employer (to show the factor was a reasonable one). In fact it was in *Criswell* that we first took up this question, only to find it not well posed in that case. *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 408, n. 10 (1985). We granted certiorari, 552 U. S. 1162 (2008), and now vacate the judgment of the Second Circuit and remand.[8]

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[6] Distinguishing the two tests mattered, the Court of Appeals explained, because even though "[t]here may have been other reasonable ways for [Knolls] to achieve its goals (as we held in *[Meacham II]*, . . . the one selected was not unreasonable." *Meacham II*, 461 F. 3d, at 146 (citation and internal quotation marks omitted). The burden of persuasion for either test was said to fall on the plaintiff, however, because "the employer is not to bear the ultimate burden of persuasion with respect to the legitimacy of its business justification." *Id.*, at 142 (citing *Wards Cove*, 490 U. S., at 659–660; internal quotation marks omitted). The majority took note of the textual signs that the RFOA was an affirmative defense, but set them aside because "*City of Jackson* . . . emphasized that there are reasonable and permissible employment criteria that correlate with age," thereby leaving it to plaintiffs to prove that a criterion is not reasonable. 461 F. 3d, at 142–143.

[7] In Judge Pooler's view, a jury "could permissibly find that defendants had not established a RFOA based on the unmonitored subjectivity of [Knolls's] plan as implemented." *Id.*, at 153 (dissenting opinion).

[8] Petitioners also sought certiorari as to "[w]hether respondents' practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constituted a 'reasonable factor other than age' as a matter of law." Pet. for Cert. i. We denied certiorari on this question and express no views on it here.

II

A

The ADEA's general prohibitions against age discrimination, 29 U. S. C. §§623(a)–(c), (e), are subject to a separate provision, §623(f), creating exemptions for employer practices "otherwise prohibited under subsections (a), (b), (c), or (e)." The RFOA exemption is listed in §623(f) alongside one for bona fide occupational qualifications (BFOQ): "It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . ." §623(f)(1).

Given how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's "five affirmative defenses," *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 122 (1985). After looking at the statutory text, most lawyers would accept that characterization as a matter of course, thanks to the familiar principle that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it." *Javierre* v. *Central Altagracia*, 217 U. S. 502, 508 (1910) (opinion for the Court by Holmes, J.); see also *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 44–45 (1948) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits . . . "); *United States* v. *First City Nat. Bank of Houston*, 386 U. S. 361, 366 (1967) (citing *Morton Salt Co.*, *supra*, at 44–45). That longstanding convention is part of the backdrop against which the Congress writes laws, and we respect it unless we have compelling reasons to think that Congress meant to put

the burden of persuasion on the other side. See *Schaffer* v. *Weast*, 546 U. S. 49, 57–58 (2005) ("Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief").

We have never been given any reason for a heterodox take on the RFOA clause's nearest neighbor, and our prior cases recognize that the BFOQ clause establishes an affirmative defense against claims of disparate treatment. See, *e. g.*, *City of Jackson*, 544 U. S., at 233, n. 3; *Western Air Lines, Inc.*, *supra*, at 414–419, and nn. 24, 29. We have likewise given the affirmative defense construction to the exemption in the Equal Pay Act of 1963 for pay differentials based on "any other factor other than sex," *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 196 (1974) (internal quotation marks omitted); and there, we took account of the particular weight given to the interpretive convention already noted, when enforcing the Fair Labor Standards Act of 1938 (FLSA), *id.*, at 196–197 ("[T]he general rule [is] that the application of an exemption under the [FLSA] is a matter of affirmative defense on which the employer has the burden of proof"). This focus makes the principle of construction the more instructive in ADEA cases: "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation," *Lorillard* v. *Pons*, 434 U. S. 575, 581 (1978). And we have remarked and relied on the "significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the 'powers, remedies, and procedures' of the FLSA." *Id.*, at 580 (quoting 29 U. S. C. § 626(b); emphasis deleted); see also *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 528 (1994) (applying reasoning of *Lorillard*); *Thurston*, *supra*, at 126 (same). As against this interpretive background, there is no hint in the text that Congress meant § 623(f)(1) to march out of step with either

the general or specifically FLSA default rules placing the burden of proving an exemption on the party claiming it.

With these principles and prior cases in mind, we find it impossible to look at the text and structure of the ADEA and imagine that the RFOA clause works differently from the BFOQ clause next to it. Both exempt otherwise illegal conduct by reference to a further item of proof, thereby creating a defense for which the burden of persuasion falls on the "one who claims its benefits," *Morton Salt Co.*, *supra*, at 44–45, the "party seeking relief," *Schaffer*, *supra*, at 57–58, and here, "the employer," *Corning Glass Works*, *supra*, at 196.

If there were any doubt, the stress of the idiom "otherwise prohibited," prefacing the BFOQ and RFOA conditions, would dispel it.[9] The implication of affirmative defense is

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[9] We do not need to seek further relief from doubt by looking to the Equal Employment Opportunity Commission (EEOC) regulations on burdens of proof in ADEA cases. The parties focus on two of them, but we think neither clearly answers the question here. One of them the Government has disavowed as overtaken by our decision in *Smith* v. *City of Jackson*, 544 U. S. 228 (2005), Brief for United States as *Amicus Curiae* 16, n. 1 (noting that 29 CFR § 1625.7(d) (2007) "takes a position that does not survive" *City of Jackson*), for the regulation seems to require a showing of business necessity as a part of the RFOA defense. Compare 29 CFR § 1625.7(d) ("When an employment practice, including a test, is claimed as a basis for different treatment . . . on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity") with *City of Jackson*, *supra*, at 243 ("Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement"). And the second regulation would take a bit of stretching to cover disparate-impact cases, for its text speaks in terms of disparate treatment. See 29 CFR § 1625.7(e) (concerning use of the RFOA defense against an "individual claim of discriminatory treatment"). The EEOC has lately proposed rulemaking that would revise both of these regulations, eliminating any reference to "business necessity" and placing the burden of proof on the employer "[w]henever the exception of 'a reasonable factor other than age' is raised." 73 Fed. Reg. 16807–16809 (2008) (proposed 29 CFR § 1625.7(e)).

underscored by contrasting §623(f)(1) with the section of the ADEA at issue in *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158 (1989), and by the way Congress responded to our decision there. In *Betts*, we said the issue was whether a provision in a former version of §623(f)(2), one about employee benefit plans, merely "redefine[d] the elements of a plaintiff's prima facie case," or instead "establish[ed] a defense" to what "otherwise would be a violation of the Act." *Id.*, at 181.[10] Although the provision contained no "otherwise prohibited" kind of language, we said that it "appears on first reading to describe an affirmative defense." *Ibid.* We nonetheless thought that this more natural view (which we had taken in *Thurston*) was overridden by evidence of legislative history, by the peculiarity of a pretext-revealing condition in the phrasing of the provision (that a benefit plan "not [be] a subterfuge to evade the purposes" of the ADEA), and by the parallel with a prior case construing an "analogous provision of Title VII" of the Civil Rights Act of 1964 (analogous because it also contained a pretext-revealing condition). 492 U. S., at 181. A year later, however, Congress responded to *Betts* by enacting the Older Workers Benefit Protection Act, 104 Stat. 978, avowedly to "restore the original congressional intent" that the ADEA's benefits provision be read as an affirmative defense, *id.*, §101. What is instructive on the question at hand is that, in clarifying that §623(f)(2) specifies affirmative defenses, Congress not only set the burden in so many words but also added the phrase "otherwise prohibited" as a part of the preface (just as in the text of §623(f)(1)).[11] Congress thus

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[10] The provision read: "It shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . because of the age of such individual." 29 U. S. C. §623(f)(2) (1982 ed.).

[11] Congress surely could not have meant this phrase to contradict its express allocation of the burden, in the same amendment. But that would

confirmed the natural implication that we find in the "otherwise prohibited" language in §623(f)(1): it refers to an excuse or justification for behavior that, standing alone, violates the statute's prohibition. The amendment in the aftermath of *Betts* shows that Congress understands the phrase the same way we naturally read it, as a clear signal that a defense to what is "otherwise prohibited" is an affirmative defense, entirely the responsibility of the party raising it.

B

Knolls ventures that, regardless, the RFOA provision should be read as mere elaboration on an element of liability. Because it bars liability where action is taken for reasons "other than age," the argument goes, the provision must be directed not at justifying age discrimination by proof of some extenuating fact but at negating the premise of liability under §623(a)(2), "because of . . . age."

The answer to this argument, however, is *City of Jackson*, where we confirmed that the prohibition in §623(a)(2) extends to practices with a disparate impact, inferring this result in part from the presence of the RFOA provision at issue here.[12] We drew on the recognized distinction between disparate-treatment and disparate-impact forms of liability, and explained that "the very definition of disparate impact" was that "an employer who classifies his employees without respect to age may still be liable under the terms

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be the upshot of Knolls's suggestion that the only way to read the word "otherwise" as not redundant in the phrase "otherwise prohibited under subsections (a), (b), (c), or (e)" is to say that the word must refer only to §623(f)(1) (2000 ed.) itself, implying that §623(f)(1) must be a liability-creating provision for which the burden falls on the plaintiff. Brief for Respondents 33, and n. 7. Besides, this argument proves too much, for it implies that even the BFOQ exemption is not an affirmative defense.

[12] In doing so, we expressly rejected the so-called "safe harbor" view of the RFOA provision. See *City of Jackson*, 544 U. S., at 238–239 (plurality opinion); *id.*, at 252–253 (O'Connor, J., concurring in judgment) (describing "safe harbor" view).

of this paragraph if such classification adversely affects the employee because of that employee's age." 544 U. S., at 236, n. 6 (plurality opinion); *id.*, at 243 (SCALIA, J., concurring in part and concurring in judgment) (expressing agreement with "all of the Court's reasoning" in the plurality opinion, but finding it a basis for deference to the EEOC rather than for independent judicial decision). We emphasized that these were the kinds of employer activities, "otherwise prohibited" by §623(a)(2), that were mainly what the statute meant to test against the RFOA condition: because "[i]n disparate-impact cases . . . the allegedly 'otherwise prohibited' activity is not based on age," it is "in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" *Id.*, at 239 (plurality opinion).

Thus, in *City of Jackson*, we made it clear that in the typical disparate-impact case, the employer's practice is "without respect to age" and its adverse impact (though "because of age") is "attributable to a nonage factor"; so action based on a "factor other than age" is the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it. The RFOA defense in a disparate-impact case, then, is not focused on the asserted fact that a non-age factor was at work; we assume it was. The focus of the defense is that the factor relied upon was a "reasonable" one for the employer to be using. Reasonableness is a justification categorically distinct from the factual condition "because of age" and not necessarily correlated with it in any particular way: a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor might do just the opposite.[13]

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[13] The factual causation that §623(a)(2) describes as practices that "deprive or tend to deprive . . . or otherwise adversely affect [employees] . . . because of . . . age" is typically shown by looking to data revealing the impact of a given practice on actual employees. See, *e. g.*, *City of Jack-*

III

The Court of Appeals majority rejected the affirmative defense reading and arrived at its position on the burden of proof question by a different route: because it read our decision in *City of Jackson* as ruling out the so-called "business necessity" enquiry in ADEA cases, the court concluded that the RFOA defense "replaces" it and therefore must conform to its burden of persuasion resting on the complaining party. But the court's premise (that *City of Jackson* modified the "business necessity" enquiry) is mistaken; this alone would be reason enough to reject its approach. And although we are now satisfied that the business necessity test should have no place in ADEA disparate-impact cases, we agree with the Government that this conclusion does not stand in the way of our holding that the RFOA exemption is an affirmative defense. See Brief for United States as *Amicus Curiae* 25–27.

To begin with, when the Court of Appeals further inferred from the *City of Jackson* reference to *Wards Cove* that the *Wards Cove* burden of persuasion (on the employee, for the business necessity enquiry) also applied to the RFOA defense, it gave short shrift to the reasons set out in Part II–A,

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son, *supra*, at 241 (opinion of the Court); cf. *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, 657, 658–659 (1989) (under Title VII, "specific causation" is shown, and a "prima facie case" is "establish[ed]," when plaintiff identifies a specific employment practice linked to a statistical disparity); *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 995 (1988) (plurality opinion) (in Title VII cases, "statistical disparities must be sufficiently substantial that they raise . . . an inference of causation").

This enquiry would be muddled if the value, "reasonableness," were to become a factor artificially boosting or discounting the factual strength of the causal link, or the extent of the measured impact. It would open the door to incoherent undershooting, for example, if defendants were heard to say that an impact is "somewhat less correlated with age, seeing as the factor is a reasonable one"; and it would be overshooting to make them show that the impact is "not correlated with age, and the factor is reasonable, besides."

supra, for reading RFOA as an affirmative defense (with the burden on the employer). But we think that even on its own terms, *City of Jackson* falls short of supporting the Court of Appeals's conclusion.

Although *City of Jackson* contains the statement that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA," 544 U. S., at 240, *City of Jackson* made only two specific references to aspects of the *Wards Cove* interpretation of Title VII that might have "remain[ed] applicable" in ADEA cases. One was to the existence of disparate-impact liability, which *City of Jackson* explained was narrower in ADEA cases than under Title VII. The other was to a plaintiff-employee's burden of identifying which particular practices allegedly cause an observed disparate impact, which is the employee's burden under both the ADEA and the pre-1991 Title VII. See 544 U. S., at 241. Neither of these references, of course, is at odds with the view of RFOA as an affirmative defense.

If, indeed, *City of Jackson*'s reference to *Wards Cove* could be read literally to include other aspects of the latter case, beyond what mattered in *City of Jackson* itself, the untoward consequences of the broader reading would rule it out. One such consequence is embraced by Meacham, who argues both that the Court of Appeals was wrong to place the burden of persuasion for the RFOA defense on the employee, and that the court was right in thinking that *City of Jackson* adopted the *Wards Cove* burden of persuasion on what Meacham views as one element of an ADEA impact claim. For Meacham takes the position that an impact plaintiff like himself has to negate business necessity in order to show that the employer's actions were "otherwise prohibited"; only then does the RFOA (with the burden of persuasion on the employer) have a role to play. To apply both tests, however, would force the parties to develop (and the court or jury to follow) two overlapping enquiries: first, whether the employment practice at issue (based on a factor other than age) is

supported by a business justification; and second, whether that factor is a reasonable one. Depending on how the first enquiry proceeds, a plaintiff might directly contest the force of the employer's rationale, or else try to show that the employer invoked it as a pretext by pointing (for example) to alternative practices with less of a disparate impact. See *Wards Cove*, 490 U. S., at 658 ("first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact"); see also *id.*, at 658–661. But even if the plaintiff succeeded at one or the other, in Meacham's scheme the employer could still avoid liability by proving reasonableness.

Here is what is so strange: as the Government says, "[i]f disparate-impact plaintiffs have already established that a challenged practice is a pretext for intentional age discrimination, it makes little sense then to ask whether the discriminatory practice is based on reasonable factors *other than age*." Brief for United States as *Amicus Curiae* 26 (emphasis in original). Conversely, proving the reasonableness defense would eliminate much of the point a plaintiff would have had for showing alternatives in the first place: why make the effort to show alternative practices with a less discriminatory effect (and besides, how would that prove pretext?), when everyone knows that the choice of a practice relying on a "reasonable" non-age factor is good enough to avoid liability?[11] At the very least, developing the reasonableness defense would be substantially redundant with the direct contest over the force of the business justification, especially when both enquiries deal with the same, narrowly

[11] See *City of Jackson*, 544 U. S., at 243 ("While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement").

specified practice. It is not very fair to take the remark about *Wards Cove* in *City of Jackson* as requiring such a wasteful and confusing structure of proof.

Nor is there any good way to read the same line from *City of Jackson* as implying that the burden of proving any business-related defense falls on the plaintiff; most obviously, this would entail no longer taking the BFOQ clause to be an affirmative defense, which *City of Jackson* confirmed that it is, see 544 U. S., at 233, n. 3. What is more, *City of Jackson* could not have had the RFOA clause in mind as "identical" to anything in Title VII (for which a *Wards Cove*'s reading might be adopted), for that statute has no like-worded defense. And as *Wards Cove* did not purport to construe any statutory defenses under Title VII, only an over-reading of *City of Jackson* would find lurking in it an assumption that *Wards Cove* has anything to say about statutory defenses in the ADEA (never mind one that Title VII does not have).

IV

As mentioned, where *City of Jackson* did get help from our prior reading of Title VII was in relying on *Wards Cove* to repeat that a plaintiff falls short by merely alleging a disparate impact, or "point[ing] to a generalized policy that leads to such an impact." *City of Jackson*, 544 U. S., at 241. The plaintiff is obliged to do more: to "isolat[e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities." *Ibid.* (quoting *Wards Cove*, *supra*, at 656; emphasis in original; internal quotation marks omitted). The aim of this requirement, as *City of Jackson* said, is to avoid the "result [of] employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances.'" 544 U. S., at 241 (quoting *Wards Cove*, *supra*, at 657; some internal quotation marks omitted). And as the outcome in that case shows, the requirement has bite: one sufficient reason for rejecting the

employees' challenge was that they "ha[d] done little more than point out that the pay plan at issue [was] relatively less generous to older workers than to younger workers," and "ha[d] not identified any specific test, requirement, or practice within the pay plan that ha[d] an adverse impact on older workers." *City of Jackson*, *supra*, at 241.

Identifying a specific practice is not a trivial burden, and it ought to allay some of the concern raised by Knolls's *amici*, who fear that recognizing an employer's burden of persuasion on an RFOA defense to impact claims will encourage strike suits or nudge plaintiffs with marginal cases into court, in turn inducing employers to alter business practices in order to avoid being sued. See, *e. g.*, Brief for General Electric Co. as *Amicus Curiae* 18–31. It is also to the point that the only thing at stake in this case is the gap between production and persuasion; nobody is saying that even the burden of production should be placed on the plaintiff. Cf. *Schaffer*, 546 U. S., at 56 (burden of persuasion answers "which party loses if the evidence is closely balanced"); *id.*, at 58 ("In truth, however, very few cases will be in evidentiary equipoise"). And the more plainly reasonable the employer's "factor other than age" is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious. It will be mainly in cases where the reasonableness of the nonage factor is obscure for some reason, that the employer will have more evidence to reveal and more convincing to do in going from production to persuasion.

That said, there is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production; nor do we doubt that this will sometimes affect the way employers do business with their employees. But at the end of the day, *amici*'s concerns have to be directed at Congress, which set the balance where it is, by both creating the RFOA exemp-

tion and writing it in the orthodox format of an affirmative defense. We have to read it the way Congress wrote it.

* * *

As we have said before, Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA, "significantly narrow[ing] its coverage." *City of Jackson*, 544 U. S., at 233. And as the outcome for the employer in *City of Jackson* shows, "it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.*, at 241. In this case, we realize that the Court of Appeals showed no hesitation in finding that Knolls prevailed on the RFOA defense, though the court expressed its conclusion in terms of Meacham's failure to meet the burden of persuasion. Whether the outcome should be any different when the burden is properly placed on the employer is best left to that court in the first instance. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER took no part in the consideration or decision of this case.

JUSTICE SCALIA, concurring in the judgment.

I do not join the majority opinion because the Court answers for itself two questions that Congress has left to the sound judgment of the Equal Employment Opportunity Commission. As represented by the Solicitor General of the United States in a brief signed by the Commission's General Counsel, the Commission takes the position that the reasonable-factor-other-than-age provision is an affirmative defense on which the employer bears the burden of proof,

and that, in disparate-impact suits brought under the Age Discrimination in Employment Act of 1967 (ADEA), that provision replaces the business-necessity test of *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989).

Neither position was contrived just for this case. Indeed, the Commission has arguably held its view on the burden-of-proof point for nearly 30 years. See 44 Fed. Reg. 68858, 68861 (1979). Although its regulation applied only to cases involving "discriminatory treatment," 29 CFR §1625.7(e) (2007), even if that covers only disparate treatment, see *ante*, at 93, n. 9, the logic of its extension to disparate-impact claims is obvious and unavoidable. See Brief for United States as *Amicus Curiae* 16, n. 1. At the very least, the regulation does not contradict the Commission's current position: It does not say that the employer bears the burden of proof *only* in discriminatory-treatment cases.

The Commission's view on the business-necessity test is newly minted, but that does not undermine it. The Commission has never expressed the contrary view that the fact-finder must consider both business necessity *and* reasonableness when an employer applies a factor that has a disparate impact on older workers. In fact, before *Smith* v. *City of Jackson*, 544 U. S. 228 (2005), the Commission had not even considered the relationship between the two standards, because it used to treat the two as *identical*. See 29 CFR §1625.7(d). After *City of Jackson* rejected that equation, see 544 U. S., at 243, the Commission decided that the business-necessity standard plays no role in ADEA disparate-impact claims, see Brief for United States as *Amicus Curiae* 25–27, and has even proposed new rules setting forth that position, see 73 Fed. Reg. 16807–16809 (2008).

Because administration of the ADEA has been placed in the hands of the Commission, and because the agency's positions on the questions before us are unquestionably reasonable (as the Court's opinion ably shows), I defer to the agency's views. See *Raymond B. Yates, M. D., P. C. Profit*

Sharing Plan v. *Hendon*, 541 U. S. 1, 24–25 (2004) (SCALIA, J., concurring in judgment). I therefore concur in the Court's judgment to vacate the judgment of the Court of Appeals.

JUSTICE THOMAS, concurring in part and dissenting in part.

I write separately to note that I continue to believe that disparate-impact claims are not cognizable under the Age Discrimination in Employment Act of 1967, 29 U. S. C. §621 *et seq.* See *Smith* v. *City of Jackson*, 544 U. S. 228, 247–268 (2005) (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment). Moreover, I disagree with the Court's statement that the "reasonable factors other than age" (RFOA) exception, §623(f)(1), is principally relevant in disparate-impact cases. Compare *City of Jackson*, *supra*, at 251–253 (opinion concurring in judgment), with *ante*, at 95–96 (citing *City of Jackson*, *supra*, at 239 (plurality opinion)). I therefore join only Parts I and II–A of the Court's opinion because I agree that the RFOA exception is an affirmative defense—when it arises in disparate-treatment cases. Here, although the Court of Appeals erred in placing the burden of proof on petitioners, I would nonetheless affirm because the only claims at issue are disparate-impact claims.

Syllabus

METROPOLITAN LIFE INSURANCE CO. ET AL. *v.* GLENN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06–923. Argued April 23, 2008—Decided June 19, 2008

Petitioner Metropolitan Life Insurance Company (MetLife) is an administrator and the insurer of Sears, Roebuck & Company's long-term disability insurance plan, which is governed by the Employee Retirement Income Security Act of 1974 (ERISA). The plan gives MetLife (as administrator) discretionary authority to determine the validity of an employee's benefits claim and provides that MetLife (as insurer) will pay the claims. Respondent Wanda Glenn, a Sears employee, was granted an initial 24 months of benefits under the plan following a diagnosis of a heart disorder. MetLife encouraged her to apply for, and she began receiving, Social Security disability benefits based on an agency determination that she could do no work. But when MetLife itself had to determine whether she could work, in order to establish eligibility for extended plan benefits, it found her capable of doing sedentary work and denied her the benefits. Glenn sought federal-court review under ERISA, see 29 U. S. C. §1132(a)(1)(B), but the District Court denied relief. In reversing, the Sixth Circuit used a deferential standard of review and considered it a conflict of interest that MetLife both determined an employee's eligibility for benefits and paid the benefits out of its own pocket. Based on a combination of this conflict and other circumstances, it set aside MetLife's benefits denial.

Held:

1. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, sets out four principles as to the appropriate standard of judicial review under §1132(a)(1)(B): (1) A court should be "guided by principles of trust law," analogizing a plan administrator to a trustee and considering a benefit determination a fiduciary act, *id.*, at 111–113; (2) trust law principles require *de novo* review unless a benefits plan provides otherwise, *id.*, at 115; (3) where the plan so provides, by granting "the administrator or fiduciary discretionary authority to determine eligibility," "a deferential standard of review [is] appropriate," *id.*, at 111, 115; and (4) if the administrator or fiduciary having discretion "is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion,'" *id.*, at 115. Pp. 110–111.

Syllabus

2. A plan administrator's dual role of both evaluating and paying benefits claims creates the kind of conflict of interest referred to in *Firestone*. That conclusion is clear where it is the employer itself that both funds the plan and evaluates the claim, but a conflict also exists where, as here, the plan administrator is an insurance company. For one thing, the employer's own conflict may extend to its selection of an insurance company to administer its plan. For another, ERISA imposes higher-than-marketplace quality standards on insurers, requiring a plan administrator to "discharge [its] duties" in respect to discretionary claims processing "solely in the interests of the [plan's] participants and beneficiaries," 29 U. S. C. § 1104(a)(1); underscoring the particular importance of accurate claims processing by insisting that administrators "provide a 'full and fair review' of claim denials," *Firestone*, *supra*, at 113; and supplementing marketplace and regulatory controls with judicial review of individual claim denials, see § 1132(a)(1)(B). Finally, a legal rule that treats insurers and employers alike in respect to the *existence* of a conflict can nonetheless take account of different circumstances by treating the circumstances as diminishing the conflict's *significance* or *severity* in individual cases. Pp. 112–115.

3. The significance of the conflict of interest factor will depend upon the circumstances of the particular case. *Firestone*'s "weighed as a 'factor' " language, 489 U. S., at 115, does not imply a change in the *standard* of review, say, from deferential to *de novo*. Nor should this Court overturn *Firestone* by adopting a rule that could bring about near universal *de novo* review of most ERISA plan claims denials. And it is not necessary or desirable for courts to create special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict. *Firestone* means what the word "factor" implies, namely, that judges reviewing a benefit denial's lawfulness may take account of several different considerations, conflict of interest being one. This kind of review is no stranger to the judicial system. Both trust law and administrative law ask judges to determine lawfulness by taking account of several different, often case-specific, factors, reaching a result by weighing all together. Any one factor will act as a tie-breaker when the others are closely balanced. Here, the Sixth Circuit gave the conflict some weight, but focused more heavily on other factors: that MetLife had encouraged Glenn to argue to the Social Security Administration that she could do no work, received the bulk of the benefits of her success in doing so (being entitled to receive an offset from her retroactive Social Security award), and then ignored the agency's finding in concluding that she could do sedentary work; and that MetLife had emphasized one medical report favoring denial of benefits, had de-

emphasized other reports suggesting a contrary conclusion, and had failed to provide its independent vocational and medical experts with all of the relevant evidence. These serious concerns, taken together with some degree of conflicting interests on MetLife's part, led the court to set aside MetLife's discretionary decision. There is nothing improper in the way this review was conducted. Finally, the *Firestone* standard's elucidation does not consist of detailed instructions, because there "are no talismanic words that can avoid the process of judgment." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 489. Pp. 115–119.

461 F. 3d 660, affirmed.

BREYER, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and ALITO, JJ., joined, and in which ROBERTS, C. J., joined as to all but Part IV. ROBERTS, C. J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 119. KENNEDY, J., filed an opinion concurring in part and dissenting in part, *post*, p. 125. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 127.

Amy K. Posner argued the cause for petitioners. With her on the briefs were *Miguel A. Estrada*, *Amir C. Tayrani*, *Gene C. Schaerr*, *Michelle M. Constandse*, and *Lee T. Paterson*.

E. Joshua Rosenkranz argued the cause for respondent. With him on the brief were *Jeremy N. Kudon*, *Malaika M. Eaton*, *Sara K. Pildis*, *Stanley L. Myers*, and *Ted M. Sichelman*.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were former *Solicitor General Clement*, *Deputy Solicitor General Kneedler*, and *Elizabeth Hopkins*.*

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*Briefs of *amici curiae* urging reversal were filed for America's Health Insurance Plans et al. by *Robert N. Eccles*, *Jonathan D. Hacker*, *Robin S. Conrad*, and *Shane Brennan*; and for the Blue Cross and Blue Shield Association by *Anthony F. Shelley*.

Briefs of *amici curiae* urging affirmance were filed for AARP by *Jay E. Sushelsky* and *Melvin R. Radowitz*; for the American Dental Association by *Jerrold J. Ganzfried* and *John H. Bogart*; for the Legal Aid Society-Employment Law Center by *Daniel M. Feinberg*, *Cassie*

JUSTICE BREYER delivered the opinion of the Court.

The Employee Retirement Income Security Act of 1974 (ERISA) permits a person denied benefits under an employee benefit plan to challenge that denial in federal court. 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.*; see § 1132(a)(1)(B). Often the entity that administers the plan, such as an employer or an insurance company, both determines whether an employee is eligible for benefits and pays benefits out of its own pocket. We here decide that this dual role creates a conflict of interest; that a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and that the significance of the factor will depend upon the circumstances of the particular case. See *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 115 (1989).

I

Petitioner Metropolitan Life Insurance Company (MetLife) serves as both an administrator and the insurer of Sears, Roebuck & Company's long-term disability insurance plan, an ERISA-governed employee benefit plan. See App. 182a–183a; 29 U. S. C. § 1003. The plan grants MetLife (as administrator) discretionary authority to determine whether an employee's claim for benefits is valid; it simultaneously provides that MetLife (as insurer) will itself pay valid benefit claims. App. 181a–182a.

Springer-Sullivan, and *Patricia A. Shiu*; for the National Association of Insurance Commissioners by *John M. Morrison* and *Gail Sciacchetano*; for the National Employment Lawyers Association et al. by *Ronald Dean* and *Mark D. DeBofsky*; for the New York City Chapter of the National Multiple Sclerosis Society by *Scott M. Riemer*; and for South Brooklyn Legal Services et al. by *Gary Stone* and *John C. Gray*.

Briefs of *amici curiae* were filed for the American Council of Life Insurers by *Bart A. Karwath* and *Carl B. Wilkerson*; for Law Professors by *Donald T. Bogan* and *Joseph Thai*; and for Trust Law and ERISA Law Professors by *Melanie B. Leslie* and *Stewart E. Sterk*.

Respondent Wanda Glenn, a Sears employee, was diagnosed with severe dilated cardiomyopathy, a heart condition whose symptoms include fatigue and shortness of breath. She applied for plan disability benefits in June 2000, and MetLife concluded that she met the plan's standard for an initial 24 months of benefits, namely, that she could not "perform the material duties of [her] own job." *Id.*, at 159a–160a. MetLife also directed Glenn to a law firm that would assist her in applying for federal Social Security disability benefits (some of which MetLife itself would be entitled to receive as an offset to the more generous plan benefits). In April 2002, an Administrative Law Judge found that Glenn's illness prevented her not only from performing her own job but also "from performing any jobs [for which she could qualify] existing in significant numbers in the national economy." App. to Pet. for Cert. 49a; see also 20 CFR § 404.1520(g) (2007). The Social Security Administration consequently granted Glenn permanent disability payments retroactive to April 2000. Glenn herself kept none of the backdated benefits: Three-quarters went to MetLife, and the rest (plus some additional money) went to the lawyers.

To continue receiving Sears plan disability benefits after 24 months, Glenn had to meet a stricter, Social-Security-type standard, namely, that her medical condition rendered her incapable of performing not only her own job but of performing "the material duties of any gainful occupation for which" she was "reasonably qualified." App. 160a. MetLife denied Glenn this extended benefit because it found that she was "capable of performing full time sedentary work." *Id.*, at 31a.

After exhausting her administrative remedies, Glenn brought this federal lawsuit, seeking judicial review of MetLife's denial of benefits. See 29 U. S. C. § 1132(a)(1)(B); 461 F. 3d 660, 665 (CA6 2006). The District Court denied relief. Glenn appealed to the Court of Appeals for the Sixth Circuit. Because the plan granted MetLife "discretionary authority

to . . . determine benefits," the Court of Appeals reviewed the administrative record under a deferential standard. *Id.*, at 666. In doing so, it treated "as a relevant factor" a "conflict of interest" arising out of the fact that MetLife was "authorized both to decide whether an employee is eligible for benefits and to pay those benefits." *Ibid.*

The Court of Appeals ultimately set aside MetLife's denial of benefits in light of a combination of several circumstances: (1) the conflict of interest; (2) MetLife's failure to reconcile its own conclusion that Glenn could work in other jobs with the Social Security Administration's conclusion that she could not; (3) MetLife's focus upon one treating physician report suggesting that Glenn could work in other jobs at the expense of other, more detailed treating physician reports indicating that she could not; (4) MetLife's failure to provide all of the treating physician reports to its own hired experts; and (5) MetLife's failure to take account of evidence indicating that stress aggravated Glenn's condition. See *id.*, at 674.

MetLife sought certiorari, asking us to determine whether a plan administrator that both evaluates and pays claims operates under a conflict of interest in making discretionary benefit determinations. The Solicitor General suggested that we also consider "'how'" any such conflict should "'be taken into account on judicial review of a discretionary benefit determination.'" Brief for United States as *Amicus Curiae* on Pet. for Cert. 22. We agreed to consider both questions. See 552 U. S. 1161 (2008).

II

In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, this Court addressed "the appropriate standard of judicial review of benefit determinations by fiduciaries or plan administrators under" § 1132(a)(1)(B), the ERISA provision at issue here. *Id.*, at 105; see also *id.*, at 108. *Firestone* set forth four principles of review relevant here.

(1) In "determining the appropriate standard of review," a court should be "guided by principles of trust law"; in doing so, it should analogize a plan administrator to the trustee of a common-law trust; and it should consider a benefit determination to be a fiduciary act (*i. e.*, an act in which the administrator owes a special duty of loyalty to the plan beneficiaries). *Id.*, at 111–113. See also *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 218 (2004); *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570 (1985).

(2) Principles of trust law require courts to review a denial of plan benefits "under a *de novo* standard" unless the plan provides to the contrary. *Firestone*, 489 U. S., at 115; see also *id.*, at 112 (citing, *inter alia*, 3 A. Scott & W. Fratcher, Law of Trusts §201, p. 221 (4th ed. 1988); G. Bogert & G. Bogert, Law of Trusts and Trustees §559, pp. 162–168 (rev. 2d ed. 1980) (hereinafter Bogert); 1 Restatement (Second) of Trusts §201, Comment *b* (1957) (hereinafter Restatement)).

(3) Where the plan provides to the contrary by granting "the administrator or fiduciary *discretionary authority* to determine eligibility for benefits," *Firestone*, 489 U. S., at 115 (emphasis added), "[t]rust principles make a *deferential standard* of review appropriate," *id.*, at 111 (citing Restatement §187 (abuse-of-discretion standard); Bogert §560, at 193–208; emphasis added).

(4) If "a benefit plan gives discretion to an administrator or fiduciary who *is operating under a conflict of interest*, that conflict must be *weighed as a 'factor* in determining whether there is an abuse of discretion.'" *Firestone*, *supra*, at 115 (quoting Restatement §187, Comment *d*; emphasis added; alteration omitted).

The questions before us, while implicating the first three principles, directly focus upon the application and the meaning of the fourth.

III

The first question asks whether the fact that a plan administrator both evaluates claims for benefits and pays benefits claims creates the kind of "conflict of interest" to which *Firestone*'s fourth principle refers. In our view, it does.

That answer is clear where it is the employer that both funds the plan and evaluates the claims. In such a circumstance, "every dollar provided in benefits is a dollar spent by . . . the employer; and every dollar saved . . . is a dollar in [the employer's] pocket." *Bruch* v. *Firestone Tire & Rubber Co.*, 828 F. 2d 134, 144 (CA3 1987). The employer's fiduciary interest may counsel in favor of granting a borderline claim while its immediate financial interest counsels to the contrary. Thus, the employer has an "interest . . . conflicting with that of the beneficiaries," the type of conflict that judges must take into account when they review the discretionary acts of a trustee of a common-law trust. Restatement § 187, Comment *d*; see also *Firestone*, *supra*, at 115 (citing that Restatement comment); cf. Black's Law Dictionary 319 (8th ed. 2004) ("[C]onflict of interest" is a "real or seeming incompatibility between one's private interests and one's public or fiduciary duties").

Indeed, *Firestone* itself involved an employer who administered an ERISA benefit plan and who both evaluated claims and paid for benefits. See 489 U. S., at 105. And thus that circumstance quite possibly was what the Court had in mind when it mentioned conflicted administrators. See *id.*, at 115. The *Firestone* parties, while disagreeing about other matters, agreed that the dual role created a conflict of interest of some kind in the employer. See Brief for Petitioners 6–7, 27–29, Brief for Respondent 9, 26, and Brief for United States as *Amicus Curiae* in *Firestone Tire & Rubber Co.* v. *Bruch*, O. T. 1988, No. 87–1054, p. 22.

MetLife points out that an employer who creates a plan that it will both fund and administer foresees, and implic-

itly approves, the resulting conflict. But that fact cannot change our conclusion. At trust law, the fact that a settlor (the person establishing the trust) approves a trustee's conflict does not change the legal need for a judge later to take account of that conflict in reviewing the trustee's discretionary decisionmaking. See Restatement § 107, Comment *f* (discretionary acts of trustee with settlor-approved conflict subject to "careful scrutiny"); *id.*, § 107, Comment *f*, Illustration 1 (conflict is "a factor to be considered by the court in determining later whether" there has been an "abuse of discretion"); *id.*, § 187, Comment *d* (same); 3 A. Scott, W. Fratcher, & M. Ascher, Scott and Ascher on Trusts § 18.2, pp. 1342–1343 (5th ed. 2007) (hereinafter Scott) (same). See also, *e. g.*, Bogert § 543, at 264 (rev. 2d ed. 1993) (settlor approval simply permits conflicted individual to act as a trustee); *id.*, § 543(U), at 422–431 (same); Scott § 17.2.11, at 1136–1139 (same).

MetLife also points out that we need not follow trust law principles where trust law is "inconsistent with the language of the statute, its structure, or its purposes." *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 447 (1999) (internal quotation marks omitted). MetLife adds that to find a conflict here is inconsistent (1) with ERISA's efforts to avoid complex review proceedings, see *Varity Corp.* v. *Howe*, 516 U. S. 489, 497 (1996); (2) with Congress' efforts not to deter employers from setting up benefit plans, see *ibid.*; and (3) with an ERISA provision specifically allowing employers to administer their own plans, see 29 U. S. C. § 1108(c)(3).

But we cannot find in these considerations any significant inconsistency. As to the first, we note that trust law functions well with a similar standard. As to the second, we have no reason, empirical or otherwise, to believe that our decision will seriously discourage the creation of benefit plans. As to the third, we have just explained why approval of a conflicted trustee differs from review of that trustee's

conflicted decisionmaking. As to all three taken together, we believe them outweighed by "Congress' desire to offer employees enhanced protection for their benefits." *Varity*, *supra*, at 497 (discussing "competing congressional purposes" in enacting ERISA).

The answer to the conflict question is less clear where (as here) the plan administrator is not the employer itself but rather a professional insurance company. Such a company, MetLife would argue, likely has a much greater incentive than a self-insuring employer to provide accurate claims processing. That is because the insurance company typically charges a fee that attempts to account for the cost of claims payouts, with the result that paying an individual claim does not come to the same extent from the company's own pocket. It is also because the marketplace (and regulators) may well punish an insurance company when its products, or ingredients of its products, fall below par. And claims processing, an ingredient of the insurance company's product, falls below par when it seeks a biased result, rather than an accurate one. Why, MetLife might ask, should one consider an insurance company *inherently* more conflicted than any other market participant, say, a manufacturer who might earn more money in the short run by producing a product with poor quality steel or a lawyer with an incentive to work more slowly than necessary, thereby accumulating more billable hours?

Conceding these differences, we nonetheless continue to believe that for ERISA purposes a conflict exists. For one thing, the employer's own conflict may extend to its selection of an insurance company to administer its plan. An employer choosing an administrator in effect buys insurance for others and consequently (when compared to the marketplace customer who buys for himself) may be more interested in an insurance company with low rates than in one with accurate claims processing. Cf. Langbein, Trust Law as Regulatory Law, 101 Nw. U. L. Rev. 1315, 1323–1324 (2007) (observing that employees are rarely involved in plan negotiations).

For another, ERISA imposes higher-than-marketplace quality standards on insurers. It sets forth a special standard of care upon a plan administrator, namely, that the administrator "discharge [its] duties" in respect to discretionary claims processing "solely in the interests of the participants and beneficiaries" of the plan, § 1104(a)(1); it simultaneously underscores the particular importance of accurate claims processing by insisting that administrators "provide a 'full and fair review' of claim denials," *Firestone*, 489 U. S., at 113 (quoting § 1133(2)); and it supplements marketplace and regulatory controls with judicial review of individual claim denials, see § 1132(a)(1)(B).

Finally, a legal rule that treats insurance company administrators and employers alike in respect to the *existence* of a conflict can nonetheless take account of the circumstances to which MetLife points so far as it treats those, or similar, circumstances as diminishing the *significance* or *severity* of the conflict in individual cases. See Part IV, *infra*.

IV

We turn to the question of "how" the conflict we have just identified should "be taken into account on judicial review of a discretionary benefit determination." 552 U. S. 1161. In doing so, we elucidate what this Court set forth in *Firestone*, namely, that a conflict should "be weighed as a 'factor in determining whether there is an abuse of discretion.'" 489 U. S., at 115 (quoting Restatement § 187, Comment *d*; alteration omitted).

We do not believe that *Firestone*'s statement implies a change in the *standard* of review, say, from deferential to *de novo* review. Trust law continues to apply a deferential standard of review to the discretionary decisionmaking of a conflicted trustee, while at the same time requiring the reviewing judge to take account of the conflict when determining whether the trustee, substantively or procedurally, has abused his discretion. See Restatement § 187, Comments *d–j*; *id.*, § 107, Comment *f*; Scott § 18.2, at 1342–1344.

We see no reason to forsake *Firestone*'s reliance upon trust law in this respect. See 489 U. S., at 111–115.

Nor would we overturn *Firestone* by adopting a rule that in practice could bring about near universal review by judges *de novo*—*i. e.*, without deference—of the lion's share of ERISA plan claims denials. See Brief for America's Health Insurance Plans et al. as *Amici Curiae* 3–4 (many ERISA plans grant discretionary authority to administrators that combine evaluation and payment functions). Had Congress intended such a system of review, we believe it would not have left to the courts the development of review standards but would have said more on the subject. See *Firestone*, *supra*, at 109 ("ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B)"); compare, *e. g.*, C. Gresenz et al., A Flood of Litigation? 8 (1999), http://www.rand.org/pubs/issue_papers/2006/IP184.pdf (all Internet materials as visited June 9, 2008, and available in Clerk of Court's case file) (estimating that 1.9 million beneficiaries of ERISA plans have health care claims denied each year), with Caseload of Federal Courts Remains Steady Overall (Mar. 11, 2008), http://www.uscourts.gov/Press_Releases/2008/caseload.cfm (257,507 total civil filings in federal court in 2007); cf. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").

Neither do we believe it necessary or desirable for courts to create special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict. In principle, as we have said, conflicts are but one factor among many that a reviewing judge must take into account. Benefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflicts—which themselves vary in kind and in degree of seriousness—for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review. Indeed, special procedural rules

would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress.

We believe that *Firestone* means what the word "factor" implies, namely, that when judges review the lawfulness of benefit denials, they will often take account of several different considerations of which a conflict of interest is one. This kind of review is no stranger to the judicial system. Not only trust law, but also administrative law, can ask judges to determine lawfulness by taking account of several different, often case-specific, factors, reaching a result by weighing all together. See Restatement § 187, Comment *d*; cf., *e. g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 415–417 (1971) (review of governmental decision for abuse of discretion); *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951) (review of agency factfinding).

In such instances, any one factor will act as a tiebreaker when the other factors are closely balanced, the degree of closeness necessary depending upon the tiebreaking factor's inherent or case-specific importance. The conflict of interest at issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration. See Langbein, *supra*, at 1317–1321 (detailing such a history for one large insurer). It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits. See Herzel & Colling, The Chinese Wall and Conflict of Interest in Banks, 34 Bus. Law 73, 114 (1978) (recommending interdepartmental information walls to reduce bank conflicts); Brief for Blue

Cross and Blue Shield Association as *Amicus Curiae* 15 (suggesting that insurers have incentives to reward claims processors for their accuracy); cf. generally J. Mashaw, Bureaucratic Justice (1983) (discussing internal controls as a sound method of producing administrative accuracy).

The Court of Appeals' opinion in the present case illustrates the combination-of-factors method of review. The record says little about MetLife's efforts to ensure accurate claims assessment. The Court of Appeals gave the conflict weight to some degree; its opinion suggests that, in context, the court would not have found the conflict alone determinative. See 461 F. 3d, at 666, 674. The court instead focused more heavily on other factors. In particular, the court found questionable the fact that MetLife had encouraged Glenn to argue to the Social Security Administration that she could do no work, received the bulk of the benefits of her success in doing so (the remainder going to the lawyers it recommended), and then ignored the agency's finding in concluding that Glenn could in fact do sedentary work. See *id.*, at 666–669. This course of events was not only an important factor in its own right (because it suggested procedural unreasonableness), but also would have justified the court in giving more weight to the conflict (because MetLife's seemingly inconsistent positions were both financially advantageous). And the court furthermore observed that MetLife had emphasized a certain medical report that favored a denial of benefits, had deemphasized certain other reports that suggested a contrary conclusion, and had failed to provide its independent vocational and medical experts with all of the relevant evidence. See *id.*, at 669–674. All these serious concerns, taken together with some degree of conflicting interests on MetLife's part, led the court to set aside MetLife's discretionary decision. See *id.*, at 674–675. We can find nothing improper in the way in which the court conducted its review.

Finally, we note that our elucidation of *Firestone*'s standard does not consist of a detailed set of instructions. In this respect, we find pertinent this Court's comments made in a somewhat different context, the context of court review of agency factfinding. See *Universal Camera Corp.*, *supra*. In explaining how a reviewing court should take account of the agency's reversal of its own examiner's factual findings, this Court did not lay down a detailed set of instructions. It simply held that the reviewing judge should take account of that circumstance as a factor in determining the ultimate adequacy of the record's support for the agency's own factual conclusion. *Id.*, at 492–497. In so holding, the Court noted that it had not enunciated a precise standard. See, *e. g.*, *id.*, at 493. But it warned against creating formulas that will "falsif[y] the actual process of judging" or serve as "instrument[s] of futile casuistry." *Id.*, at 489. The Court added that there "are no talismanic words that can avoid the process of judgment." *Ibid.* It concluded then, as we do now, that the "[w]ant of certainty" in judicial standards "partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review." *Id.*, at 477.

We affirm the judgment of the Court of Appeals.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring in part and concurring in the judgment.

I join all but Part IV of the Court's opinion. I agree that a third-party insurer's dual role as a claims administrator and plan funder gives rise to a conflict of interest that is pertinent in reviewing claims decisions. I part ways with the majority, however, when it comes to *how* such a conflict should matter. See *ante*, at 115–118 and this page. The majority would accord weight, of varying and indeterminate amount, to the existence of such a conflict in every case

where it is present. See *ante*, at 117–118. The majority's approach would allow the bare existence of a conflict to enhance the significance of other factors already considered by reviewing courts, even if the conflict is not shown to have played any role in the denial of benefits. The end result is to increase the level of scrutiny in every case in which there is a conflict—that is, in many if not most ERISA cases—thereby undermining the deference owed to plan administrators when the plan vests discretion in them.

I would instead consider the conflict of interest on review only where there is evidence that the benefits denial was motivated or affected by the administrator's conflict. No such evidence was presented in this case. I would nonetheless affirm the judgment of the Sixth Circuit, because that court was justified in finding an abuse of discretion on the facts of this case—conflict or not.

In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101 (1989), this Court recognized that plan sponsors could, by the terms of the plan, reserve the authority to make discretionary claims decisions that courts would review only for an abuse of that discretion. *Id.*, at 111. We have long recognized "the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 54 (1987). Ensuring that reviewing courts respect the discretionary authority conferred on ERISA fiduciaries encourages employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do. Cf. *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 215 (2004).

The conflict of interest at issue here is a common feature of ERISA plans. The majority acknowledges that the "lion's share of ERISA plan claims denials" are made by administrators that both evaluate and pay claims. See *ante*, at 116; see also *Guthrie* v. *National Rural Elec. Coop. Assn. Long-Term Disability Plan*, 509 F. 3d 644, 650 (CA4 2007) (describing use of dual-role administrators as "'simple and

commonplace'" (quoting *Colucci* v. *Agfa Corp. Severance Pay Plan*, 431 F. 3d 170, 179 (CA4 2005))); *Hall* v. *UNUM Life Ins. Co.*, 300 F. 3d 1197, 1205 (CA10 2002) (declining to permit additional evidence on review "whenever the same party is the administrator and payor" because such an arrangement is "commonplace"). For this reason, the majority is surely correct in concluding that it is important to retain deferential review for decisions made by conflicted administrators, in order to avoid "near universal review by judges *de novo*." *Ante*, at 116.

But the majority's approach does not do so. Saying that courts should consider the mere existence of a conflict in every case, without focusing that consideration in any way, invites the substitution of judicial discretion for the discretion of the plan administrator. Judicial review under the majority's opinion is less constrained, because courts can look to the bare presence of a conflict as authorizing more exacting scrutiny.

This problem is exacerbated because the majority is so imprecise about how the existence of a conflict should be treated in a reviewing court's analysis. The majority is forthright about this failing. In a triumph of understatement, the Court acknowledges that its approach "does not consist of a detailed set of instructions." *Ante*, at 119. The majority tries to transform this vice into a virtue, pointing to the practice of courts in reviewing agency determinations. See *ante*, at 117, 119. The standard of review for agency determinations has little to nothing to do with the appropriate test for identifying ERISA benefits decisions influenced by a conflict of interest. In fact, we have rejected this analogy before, see *Firestone*, *supra*, at 109–110 (rejecting the arbitrary and capricious standard of review under the Labor Management and Relations Act for claims brought under 29 U. S. C. §1132(a)(1)(B)), and not even the Solicitor General, whose position the majority accepts, endorses it, see Brief for United States as *Amicus Curiae* 29–30, n. 3 (noting

the "key differences between ERISA and the administrative law context").

Pursuant to the majority's strained analogy, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), makes an unexpected appearance on stage. The case is cited for the proposition that the lack of certainty in judicial standards "'partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review.'" *Ante*, at 119 (quoting *Universal Camera*, *supra*, at 477). Maybe. But certainty and predictability are important criteria under ERISA, and employers considering whether to establish ERISA plans can have no notion what it means to say that a standard feature of such plans will be one of the "impalpable factors involved in judicial review" of benefits decisions. See *Rush Prudential HMO, Inc.* v. *Moran*, 536 U. S. 355, 379 (2002) (noting "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct"). The Court leaves the law more uncertain, more unpredictable than it found it. Cf. O. Holmes, The Common Law 101 (M. Howe ed. 1963) ("[T]he tendency of the law must always be to narrow the field of uncertainty").

Nothing in *Firestone* compels the majority's kitchen-sink approach. In *Firestone*, the Court stated that a conflict of interest "must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" 489 U. S., at 115 (quoting Restatement (Second) of Trusts § 187, Comment *d* (1957); alteration in original). The cited Restatement confirms that treating the existence of a conflict of interest "as a factor" means considering whether the conflicted trustee "is *acting* from an improper motive" so as to "further some interest of his own or of a person other than the beneficiary." *Id.*, § 187, Comment *g* (emphasis added). See also *post*, at 130–133 (SCALIA, J., dissenting). The language in *Firestone* does not specify whether the existence of a conflict should be thrown into the mix in an indeterminate way along with

all other considerations pertinent in reviewing a benefits decision, as the majority would apparently have it, or instead weighed to determine whether it actually affected the decision.

It is the actual motivation that matters in reviewing benefits decisions for an abuse of discretion, not the bare presence of the conflict itself. Consonant with this understanding, a conflict of interest can support a finding that an administrator abused its discretion only where the evidence demonstrates that the conflict actually motivated or influenced the claims decision. Such evidence may take many forms. It may, for example, appear on the face of the plan, see *Pegram* v. *Herdrich*, 530 U. S. 211, 227, n. 7 (2000) (offering hypothetical example of a plan that gives "a bonus for administrators who denied benefits to every 10th beneficiary"); it may be shown by evidence of other improper incentives, see *Armstrong* v. *Aetna Life Ins. Co.*, 128 F. 3d 1263, 1265 (CA8 1997) (insurer provided incentives and bonuses to claims reviewers for "claims savings"); or it may be shown by a pattern or practice of unreasonably denying meritorious claims, see *Radford Trust* v. *First Unum Life Ins. Co. of Am.*, 321 F. Supp. 2d 226, 247 (Mass. 2004) (finding a "pattern of erroneous and arbitrary benefits denials, bad faith contract misinterpretations, and other unscrupulous tactics"). The mere existence of a conflict, however, is not justification for heightening the level of scrutiny, either on its own or by enhancing the significance of other factors.

The majority's application of its approach confirms its overbroad reach and indeterminate nature. Three sets of circumstances, the majority finds, warrant the conclusion that MetLife's conflict of interest influenced its decision to deny Glenn's claim for benefits: MetLife's failure to account for the Social Security Administration's finding of disability after MetLife encouraged Glenn to apply to the agency for benefits; MetLife's emphasis of favorable medical reports and deemphasis of unfavorable ones; and MetLife's failure to pro-

vide its internal experts with all the relevant evidence of Glenn's medical condition. See *ante*, at 118. These facts simply prove that MetLife abused its discretion in failing to consider relevant, expert evidence on the question of Glenn's disability status. There is no basis for supposing that the conflict of interest lent any greater significance to these factors, and no logical reason to give the factors an extra dollop of weight because of the structural conflict.

Even the fact that MetLife took "seemingly inconsistent positions" regarding Glenn's claim for Social Security benefits falls short. *Ante*, at 118. That MetLife stood to gain financially from ignoring the agency's finding and denying Glenn's claim does not show improper motivation. If it did, every decision to deny a claim made by a dual-role administrator would automatically qualify as an abuse of discretion. No one here advocates such a *per se* rule. As for MetLife's referral of Glenn to the agency, the plan itself required MetLife to deduct an estimated amount of Social Security disability benefits "whether or not [Glenn] actually appl[ied] for and receive[d] those amounts," App. 167a, and to assist plan participants like Glenn in applying for Social Security benefits, see *id.*, at 168a. Hence, it was not the conflict that prompted MetLife to refer Glenn to the agency, but the plan itself, a requirement that any administrator, whether conflicted or not, would be obligated to enforce.

In fact, there is no indication that the Sixth Circuit viewed the deficiencies in MetLife's decision as a product of its conflict of interest. Apart from remarking on the conflict at the outset and the conclusion of its opinion, see 461 F. 3d 660, 666, 674 (2006), the court never again mentioned MetLife's inconsistent obligations in the course of reversing the administrator's decision. As the court explained, MetLife's decision "was not the product of a principled and deliberative reasoning process." *Id.*, at 674. MetLife failed to acknowledge the contrary conclusion reached by the Social Security

Administration, gave scant weight to the contrary medical evidence supplied by Dr. Patel, and neglected to provide its internal experts with Dr. Patel's reports. *Ibid.*; see also *ante*, at 118. In these circumstances, the Court of Appeals was justified in finding an abuse of discretion wholly apart from MetLife's conflict of interest.

I would therefore affirm the judgment below.

JUSTICE KENNEDY, concurring in part and dissenting in part.

The Court sets forth an important framework for the standard of review in ERISA cases, one consistent with our holding in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101 (1989). In my view this is correct, and I concur in those parts of the Court's opinion that discuss this framework. In my submission, however, the case should be remanded so that the Court of Appeals can apply the standards the Court now explains to these facts.

There are two ways to read the Court's opinion. The Court devotes so much of its discussion to the weight to be given to a conflict of interest that one should conclude this has considerable relevance to the conclusion that MetLife wrongfully terminated respondent's disability payments. This interpretation is the one consistent with the question the Court should address and with the way the case was presented to us. A second reading is that the Court concludes MetLife's conduct was so egregious that it was an abuse of discretion even if there were no conflict at all; but if that is so then the first 11 pages of the Court's opinion is unnecessary to its disposition.

The Court has set forth a workable framework for taking potential conflicts of interest in ERISA benefits disputes into account. It is consistent with our opinion in *Firestone*, and it protects the interests of plan beneficiaries without undermining the ability of insurance companies to act simultane-

ously as plan administrators and plan funders. The linchpin of this framework is the Court's recognition that a structural conflict "should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits." *Ante*, at 117. And it is on this point that the Court's opinion parts company with the decision of the Court of Appeals for the Sixth Circuit. The Court acknowledges that the structural conflict of interest played some role in the Court of Appeals' determination that MetLife had abused its discretion. *Ante*, at 118. But as far as one can tell, the Court of Appeals made no effort to assess whether MetLife employed structural safeguards to avoid conflicts of interest, safeguards the Court says can cause the importance of a conflict to vanish.

The Court nonetheless affirms the judgment, without giving MetLife a chance to defend its decision under the standards the Court articulates today. In doing so, it notes that "[t]he record says little about MetLife's efforts to ensure accurate claims assessment," *ibid.*, thereby implying that MetLife is to blame for failing to introduce structural evidence in the earlier proceedings. Until today's opinion, however, a party in MetLife's position had no notice of the relevance of these evidentiary considerations.

By reaching out to decide the merits of this case without remanding, the Court disadvantages MetLife solely for its failure to anticipate the instructions in today's opinion. This is a deviation from our practice, and it is unfair. Given the importance of evidence pertaining to structural safeguards, this case should have been remanded to allow the Court of Appeals to consider this matter further in light of the Court's ruling.

For these reasons, I concur in part but dissent from the order affirming the judgment.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I agree with the Court that petitioner Metropolitan Life Insurance Company (hereinafter petitioner) has a conflict of interest. A third-party insurance company that administers an ERISA-governed disability plan and that pays for benefits out of its own coffers profits with each benefits claim it rejects. I see no reason why the Court must volunteer, however, that *an employer* who administers its own ERISA-governed plan "clear[ly]" has a conflict of interest. See *ante*, at 112. At least one Court of Appeals has thought that while the insurance-company-administrator has a conflict, the employer-administrator does not. See *Colucci* v. *Agfa Corp. Severance Pay Plan*, 431 F. 3d 170, 179 (CA4 2005). I would not resolve this question until it has been presented and argued, and the Court's unnecessary and uninvited resolution must be regarded as dictum.

The more important question is how the existence of a conflict should bear upon judicial review of the administrator's decision, and on that score I am in fundamental disagreement with the Court. Even if the choice were mine as a policy matter, I would not adopt the Court's totality-of-the-circumstances (so-called) "test," in which the existence of a conflict is to be put into the mix and given some (unspecified) "weight." This makes each case unique, and hence the outcome of each case unpredictable—not a reasonable position in which to place the administrator that has been explicitly given discretion by the creator of the plan, despite the existence of a conflict. See *ante*, at 121–122 (ROBERTS, C. J., concurring in part and concurring in judgment). More importantly, however, this is not a question to be solved by this Court's policy views; our cases make clear that it is to be

governed by the law of trusts. Under that law, a fiduciary with a conflict does not abuse its discretion unless the conflict *actually* and *improperly motivates* the decision. There is no evidence of that here.

I

Our opinion in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101 (1989), does not provide the answer to the all-important question in this case, but it does direct us to the answer. It held that federal courts hearing 29 U. S. C. § 1132(a)(1)(B) claims should review the decisions of ERISA-plan administrators the same way that courts have traditionally reviewed decisions of trustees. 489 U. S., at 111. In trust law, the decision of a trustee who was not vested with discretion would be reviewed *de novo*. *Id.*, at 112–113. Citing the Restatement of Trusts current at the time of ERISA's enactment, *Firestone* acknowledged that courts traditionally would defer to trustees vested with discretion, but rejected that course in the case at hand because, among other reasons, the *Firestone* plan did not vest its administrator with discretion. *Id.*, at 111 (citing Restatement (Second) of Trusts § 187 (1957) (hereinafter Restatement)). Accordingly, *Firestone* had no occasion to consider the scope of, or limitations on, the deference accorded to fiduciaries with discretion. But in sheer dictum quoting a portion of one comment of the Restatement, our opinion said, "[o]f course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" 489 U. S., at 115 (quoting Restatement § 187, Comment *d*).

The Court takes that throwaway dictum literally and builds a castle upon it. See *ante*, at 115–118. But the dictum cannot bear that weight, and the Court's "elucidation" of the sentence does not reveal trust-law practice as much as it reveals the Justices' fondness for a judge-liberating totality-of-the-circumstances "test." The Restatement does

indeed list in Comment *d* certain circumstances (including conflict of interest) that "may be relevant" to deciding whether a trustee has abused his discretion.[1] It does *not*, however, suggest that they should all be chucked into a brown paper bag and shaken up to determine the answer. Nowhere does it mention the majority's *modus operandi* of "weighing" all these factors together. To the contrary, the immediately following Comments *(e–l)* precisely elaborate upon *how* some of those factors (factor (1), extent of discretion, see Comment *j;* factor (4), existence of an external standard for judging reasonableness, see Comment *i;* factors (5) and (6), motives of the trustee and conflict of interest, see Comment *g*) are relevant—making very clear that each of them can be *alone* determinative, without the necessity of "weighing" other factors. These later Comments also address other factors not even included in the earlier listing, some of which can be alone determinative. See Comment *h*, Trustee's failure to use his judgment; Comment *k*, Limits of power of settlor to confer discretion.

Instead of taking the pain to reconcile the entirety of the Restatement section with the *Firestone* dictum, the Court treats the dictum like a statutory command, and makes up a standard (if one can call it that) to make sense of the dictum. The opinion is painfully opaque, despite its promise of elucidation. It variously describes the object of judicial review as "determining whether the trustee, substantively or proce-

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[1] Comment *d* provides in full: "*Factors in determining whether there is an abuse of discretion.* In determining the question whether the trustee is guilty of an abuse of discretion in exercising or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries."

durally, has abused his discretion" (*ante*, at 115), determining "the lawfulness of benefit denials" (*ante*, at 117), and as tantamount to "review of agency factfinding" *(ibid.)*. How a court should go about conducting this review is unclear. The opinion is rife with instruction on what a court should *not* do. See *ante*, at 115–116. In the final analysis, the Court seems to advance a gestalt reasonableness standard (a "combination-of-factors method of review," the opinion calls it, *ante*, at 118), by which a reviewing court, mindful of being deferential, should nonetheless consider all the circumstances, weigh them as it thinks best, then divine whether a fiduciary's discretionary decision should be overturned.[2] Notwithstanding the Court's assurances to the contrary, *ante*, at 115–117, that is nothing but *de novo* review in sheep's clothing.[3]

Looking to the common law of trusts (which is, after all, what the *holding* of *Firestone* binds us to do), I would adopt the entirety of the Restatement's clear guidelines for judicial review. In trust law, a court reviewing a trustee's decision would substitute its own *de novo* judgment for a trustee's only if it found either that the trustee had no discretion in making the decision, see *Firestone*, *supra*, at 111–112, or that the trustee had discretion but abused it, see Restatement

[2] I do not take the Court to adopt respondent's position that courts should consider all the circumstances to determine *how much deference* a trustee's decision deserves. See Brief for Respondent 46–50. The opinion disavows that reading. See *ante*, at 115 ("We do not believe that *Firestone*'s statement implies a change in the *standard* of review, say, from deferential to *de novo* review"). Of course when one is speaking of deferring to the judgment of another decisionmaker, the notion that there are degrees of deference is absurd. There are degrees of *respect* for the decisionmaker, perhaps—but the court either defers, or it does not. "Some deference," or "less than total deference," is no deference at all.

[3] The Solicitor General proposes an equally gobbledygook standard: "Reasonableness Under The Totality Of The Circumstances," a.k.a. "[r]eview . . . as searching . . . as the facts and circumstances . . . warrant," by which a reviewing court takes "extra care" to ensure that a decision is reasonable. See Brief for United States as *Amicus Curiae* 22, 25.

§ 187. Otherwise, the court would defer to the trustee. Cf. *Shelton* v. *King*, 229 U. S. 90, 94–95 (1913). "Abuse of discretion," as the Restatement uses the term, refers specifically to four distinct failures: The trustee acted dishonestly; he acted with some other improper motive; he failed to use judgment; or he acted beyond the bounds of a reasonable judgment. See Restatement § 187, Comment *e*.

The Restatement discusses all four of these manners of abusing discretion successively, in Comments *f*, *g*, *h*, and *i*, describing the aim of a court's inquiry into each. A trustee abuses his discretion by acting dishonestly when, for example, he accepts bribes. See *id.*, § 187, Comment *f*. A trustee abuses his discretion by failing to use his judgment, when he acts "without knowledge of or inquiry into the relevant circumstances and merely as a result of his arbitrary decision or whim." *Id.*, § 187, Comment *h*. A trustee abuses his discretion by acting unreasonably when his decision is substantively unreasonable either with regard to his exercise of a discretionary power or with regard to his assessment of whether the preconditions to that exercise have been met.[4] See *id.*, § 187, Comment *i*. And—most important for this case—a trustee abuses his discretion by acting on an improper motive when he acts "from a motive other than to further the purposes of the trust." *Id.*, § 187, Comment *g*. Improper motives include "spite or prejudice or *to further some interest of his own* or of a person other than the beneficiary." *Ibid.* (emphasis added).

The four abuses of discretion are clearly separate and distinct. Indeed, the circumstances the Restatement identifies as relevant for finding each abuse of discretion are not identi-

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[4] The latter is the sort of discretionary decision challenged in this case. Petitioner, as a precondition to paying respondent's benefits, had to assess whether she was disabled. Cf. Restatement § 187, Comment *i*, Illustration 9 (dealing with a trustee's assessment of a beneficiary's competence to manage property, which is the condition of the trustee's obligation to pay the principal of the trust to that beneficiary).

fied as relevant for finding the other abuses of discretion. For instance, "the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged," *id.*, § 187, Comment *d*, is alluded to *only* in the later Comment dealing with abuse of discretion by acting beyond the bounds of reasonable judgment, *id.*, § 187, Comment *i*. And particularly relevant to the present case, "the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries," *id.*, § 187, Comment *d*, is mentioned only in the later Comment dealing with abuse of discretion by reason of improper motive, *id.*, § 187, Comment *g*. The other Comments do not even hint that a conflict of interest is relevant to determining whether one of the other three types of abuse of discretion exists.

Common sense confirms that a trustee's conflict of interest is irrelevant to determining the substantive reasonableness of his decision. A reasonable decision is reasonable whether or not the person who makes it has a conflict. If it were otherwise, the consequences would be perverse: A trustee without a conflict could take either of two reasonable courses of action, but a trustee with a conflict, facing the same two choices, would be compelled to take the course that avoids the appearance of self-dealing. He would have to do that even if he thought the other one would better serve the beneficiary's interest, lest his determination be set aside as unreasonable. It makes no sense to say that a lurking conflict of interest, or the mere identity of the trustee, can make a reasonable decision unreasonable, or a well-thought-out, informed decision uninformed or arbitrary. The Restatement echoes the commonsensical view: It explains that a court applying trust law must pretermit its inquiry into whether a trustee abused his discretion by acting unreasonably when there is no standard for evaluating reasonableness, but "[i]n such a case . . . the court will interpose if the trustee act[ed] dishonestly, or from some improper motive." *Id.*, § 187,

Comment *i*. That explanation plainly excludes the court's "weighing" of a trustee's conflict of interest.

A trustee's conflict of interest is relevant (and *only* relevant) for determining whether he abused his discretion by acting with an improper motive. It does not itself prove that he did so, but it is the predicate for an inquiry into motive, and can be part of the circumstantial evidence establishing wrongful motive. That circumstantial evidence could theoretically include the unreasonableness of the decision—but using it for that purpose would be entirely redundant, since unreasonableness *alone* suffices to establish an abuse of discretion. There are no gradations of reasonableness, so that one might infer that a trustee acted upon his conflict of interest when he chose a "less reasonable," yet self-serving, course, but not when he chose a "more reasonable," yet self-serving, course. Reasonable is reasonable. A reasonable decision is one over which reasonable minds seeking the "best" or "right" answer could disagree. It is a course that a trustee acting in the best interest of the beneficiary *might* have chosen. Gradating reasonableness, and making it a "factor" in the improper-motive determination, would have the precise effect of eliminating the discretion that the settlor has intentionally conferred upon the trustee with a conflict, for such a trustee would be foreclosed from making an otherwise reasonable decision. See *supra*, at 132 and this page.

Respondent essentially asks us to presume that all fiduciaries with a conflict act in their selfish interest, so that their decisions are automatically reviewed with less than total deference (how much less is unspecified). But if one is to draw any inference about a fiduciary from the fact that he made an informed, reasonable, though apparently self-serving discretionary decision, it should be that he *suppressed* his selfish interest (as the settlor anticipated) in compliance with his duties of good faith and loyalty. See, *e. g.*, *Gregory* v. *Moose*, 266 Ark. 926, 933–934, 590 S. W. 2d 665,

670–671 (1979) (citing *Jarvis* v. *Boatmen's Nat. Bank of St. Louis*, 478 S. W. 2d 266, 273 (Mo. 1972)). Only such a presumption can vindicate the trust principles and ERISA provisions that permit settlors to appoint fiduciaries with a conflict in the first place. See *Pegram* v. *Herdrich*, 530 U. S. 211, 225 (2000).

II

Applying the Restatement's guidelines to this case, I conclude that the only possible basis for finding an abuse of discretion would be unreasonableness of petitioner's determination of no disability. The principal factor suggesting that is the finding of disability by the Social Security Administration (SSA). But ERISA fiduciaries need not always reconcile their determinations with the SSA's, nor is the SSA's conclusion entitled to any special weight. Cf. *Black & Decker Disability Plan* v. *Nord*, 538 U. S. 822, 834 (2003). The SSA's determination may have been wrong, and it was contradicted by other medical opinion.

We did not take this case to make the reasonableness determination, but rather to clarify when a conflict exists, and how it should be taken into account. I would remand to the Court of Appeals for its determination of the reasonableness of petitioner's denial, without regard to the existence of a conflict of interest.

Syllabus

KENTUCKY RETIREMENT SYSTEMS ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06–1037. Argued January 9, 2008—Decided June 19, 2008

Kentucky permits "hazardous position" workers, *e. g.*, policemen, to receive normal retirement benefits after working either 20 years or 5 years and attaining age 55 and pays "disability retirement" benefits to workers meeting specified requirements. Kentucky's "Plan" calculates normal retirement benefits based on actual years of service. The Plan calculates disability benefits by adding to an employee's actual years of service the number of years that the employee would have had to continue working in order to become eligible for normal retirement benefits, adding no more than the number of years the employee had previously worked. Charles Lickteig, who continued working after becoming eligible for retirement at age 55, became disabled and retired at age 61. He filed an age discrimination complaint with respondent (EEOC) after the Plan based his pension on his actual years of service without imputing any additional years. The EEOC filed suit against Kentucky and others (collectively Kentucky), arguing that the Plan failed to impute years solely because Lickteig became disabled after age 55. The District Court granted Kentucky summary judgment, holding that the EEOC could not establish age discrimination, but the Sixth Circuit ultimately reversed on the ground that the Plan violated the Age Discrimination in Employment Act of 1967 (ADEA).

Held: Kentucky's system does not discriminate against workers who become disabled after becoming eligible for retirement based on age. Pp. 141–150.

(a) The ADEA forbids an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age.*" 29 U. S. C. §623(a)(1) (emphasis added). A plaintiff claiming age-related "disparate treatment" (*i. e., intentional* discrimination) must prove that age "*actually motivated* the employer's decision." *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (emphasis added). In *Hazen Paper*, the Court found that, without evidence of intent, a dismissal based on pension status was not a dismissal "because of . . . age," *id.*, at 611–612, noting that, though pension status depended upon years of service, and years

of service typically go hand in hand with age, the two concepts are "analytically distinct," *id.*, at 611. And the dismissal at issue there, if based purely on pension status, would not embody the evils prompting the ADEA: It was not based on a "prohibited stereotype" of older workers, did not produce any "attendant stigma" to those workers, and was not "the result of an inaccurate and denigrating generalization about age." *Id.*, at 612. However, the Court noted that discrimination based on pension status could violate the ADEA if pension status was a "proxy for age." *Id.*, at 613. Pp. 141–143.

(b) Applying *Hazen Paper*, the circumstances here, taken together, show that the differences in treatment in this particular instance were not "actually motivated" by age. (1) Age and pension status remain "analytically distinct" concepts. (2) Here, several background circumstances eliminate the possibility that pension status serves as a "proxy for age." Rather than an individual employment decision, at issue here are complex systemwide rules involving not wages, but pensions—a benefit the ADEA treats somewhat more flexibly and leniently in respect to age. Further, Congress has otherwise approved programs, such as Social Security Disability Insurance, that calculate disability benefits using a formula that expressly takes account of age. (3) The disparity here has a clear non-age-related rationale. The Plan's disability rules track Kentucky's "normal retirement" rules by imputing *only* those additional years of service needed to bring the disabled worker's total to 20 or to the number of years that the individual would have worked had he worked to age 55. Thus, the disability rules' purpose is to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for "normal retirement" benefits. Age factors into the disability calculation only because the normal retirement rules themselves permissibly consider age. The Plan simply seeks to treat disabled employees as if they had worked until the point at which they would be eligible for a normal pension. Thus, the disparity turns upon pension eligibility and nothing more. (4) Although the Plan placed an older worker at a disadvantage here, in other cases, the rules can work to the advantage of older workers, who may get a bigger boost of imputed years than younger workers. (5) Kentucky's system does not rely on the sorts of stereotypical assumptions, *e. g.*, the work capacity of "older" workers *relative to* "younger" workers, that the ADEA sought to eradicate. The Plan's "assumptions" that no disabled worker would have continued to work beyond the point at which he was both disabled and pension eligible do not involve age-related stereotypes, but apply equally to all workers regardless of age. (6) The nature of the Plan's eligibility requirements means that, unless Ken-

Syllabus

tucky were severely to cut the benefits to disabled workers who are not yet pension eligible, it would have to increase the benefits available to disabled, pension-eligible workers, while lacking any clear criteria for determining how many extra years to impute for those already 55 or older. The difficulty of finding a remedy that can both correct the disparity and achieve the Plan's legitimate objective—providing each disabled worker with a sufficient retirement benefit—further suggests that this objective, not age, "actually motivated" the Plan.

The Court's opinion in no way unsettles the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA. The Court is dealing with the quite special case of differential treatment based on *pension status*, where pension status—with the explicit blessing of the ADEA—itself turns, in part, on age. Further, the rule for dealing with this sort of case is clear: Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was "actually motivated" by *age*, not pension status. Pp. 143–148.

(c) The Federal Government's additional arguments are rejected. Since *Hazen Paper* provides the relevant precedent here, an ADEA amendment made in light of *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158, is beside the point. And a contrary interpretation contained in an EEOC regulation and its compliance manual does not lead to a different conclusion. Pp. 148–150.

467 F. 3d 571, reversed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SOUTER, and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which SCALIA, GINSBURG, and ALITO, JJ., joined, *post*, p. 150.

Robert D. Klausner argued the cause for petitioners. With him on the briefs were *Gregory D. Stumbo*, Attorney General of Kentucky, *David Brent Irvin*, Assistant Attorney General, *C. Joseph Beavin*, *James D. Allen*, *E. Joshua Rosenkranz*, *Kenneth H. Kirschner*, *N. Scott Lilly*, *William P. Hanes*, and *J. Eric Wampler*.

Malcolm L. Stewart argued the cause for respondent. With him on the brief were former *Solicitor General Clem-*

ent, Acting Solicitor General Garre, Ronald S. Cooper, Lorraine C. Davis, and *Carolyn L. Wheeler.**

JUSTICE BREYER delivered the opinion of the Court.

The Commonwealth of Kentucky permits policemen, firemen, and other "hazardous position" workers to retire and to receive "normal retirement" benefits after either (1) working for 20 years; or (2) working for 5 years and attaining the age of 55. See Ky. Rev. Stat. Ann. §§ 16.576, 16.577(2) (Lexis 2003), 61.592(4) (Lexis Supp. 2003). It permits those who become seriously disabled but have not otherwise become eligible for retirement to retire immediately and receive "disability retirement" benefits. See § 16.582(2)(b) (Lexis 2003). And it treats some of those disabled individuals more generously than it treats some of those who became disabled only after becoming eligible for retirement on the basis of age. The question before us is whether Kentucky's system consequently discriminates against the latter workers "because of . . . age." Age Discrimination in Employment Act of 1967 (ADEA or Act), § 4(a)(1), 81 Stat. 603, 29 U. S. C. § 623(a)(1). We conclude that it does not.

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Michael A. Cox*, Attorney General of Michigan, *Thomas L. Casey*, Solicitor General, and *Larry F. Brya*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Talis J. Colberg* of Alaska, *Dustin McDaniel* of Arkansas, *John Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Lawrence G. Wasden* of Idaho, *Douglas F. Gansler* of Maryland, *Lori Swanson* of Minnesota, *Gary K. King* of New Mexico, *W. A. Drew Edmondson* of Oklahoma, *Henry McMaster* of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, and *Greg Abbott* of Texas; for the National Association of Counties et al. by *Richard Ruda;* for the National Association of State Retirement Administrators et al. by *Robert E. Tarcza;* and for the National School Boards Association by *Francisco M. Negrón, Jr.*, and *Lisa E. Soronen.*

Laurie A. McCann and *Melvin R. Radowitz* filed a brief for AARP et al. as *amici curiae* urging affirmance.

I

A

Kentucky has put in place a special retirement plan (Plan) for state and county employees who occupy "[h]azardous position[s]," *e. g.*, active duty law enforcement officers, firefighters, paramedics, and workers in correctional systems. See Ky. Rev. Stat. Ann. §61.592(1)(a) (Lexis Supp. 2003). The Plan sets forth two routes through which such an employee can become eligible for what is called "normal retirement" benefits. The first makes an employee eligible for retirement after 20 years of service. The second makes an employee eligible after only 5 years of service provided that the employee has attained the age of 55. See §§16.576, 16.577(2), 61.592(4). An employee eligible under either route will receive a pension calculated in the same way: Kentucky multiplies years of service times 2.5% times final preretirement pay. See §16.576(3).

Kentucky's Plan has special provisions for hazardous position workers who become disabled but are not yet eligible for normal retirement. Where such an employee has worked for five years or became disabled in the line of duty, the employee can retire at once. See §§16.576(1), 16.582(2) (Lexis 2003). In calculating that employee's benefits Kentucky will add a certain number of ("imputed") years to the employee's actual years of service. The number of imputed years equals the number of years that the disabled employee would have had to continue working in order to become eligible for normal retirement benefits, *i. e.*, the years necessary to bring the employee up to 20 years of service or to at least 5 years of service when the employee would turn 55 (whichever number of years is lower). See §16.582(5)(a) (Lexis 2003). Thus, if an employee with 17 years of service becomes disabled at age 48, the Plan adds 3 years and calculates the benefits as if the employee had completed 20 years of service. If an employee with 17 years of service becomes

disabled at age 54, the Plan adds 1 year and calculates the benefits as if the employee had retired at age 55 with 18 years of service.

The Plan also imposes a ceiling on imputed years equal to the number of years the employee has previously worked (*i. e.*, an employee who has worked eight years cannot receive more than eight additional imputed years), see § 16.582(5)(a); it provides for a certain minimum payment, see § 16.582(6) (Lexis 2003); and it contains various other details, none of which is challenged here.

B

Charles Lickteig, a hazardous position worker in the Jefferson County Sheriff's Department, became eligible for retirement at age 55, continued to work, became disabled, and then retired at age 61. The Plan calculated his annual pension on the basis of his actual years of service (18 years) times 2.5% times his final annual pay. Because Lickteig became disabled after he had already become eligible for normal retirement benefits, the Plan did not impute any additional years for purposes of the calculation.

Lickteig complained of age discrimination to the Equal Employment Opportunity Commission (EEOC); and the EEOC then brought this age discrimination lawsuit against the Commonwealth of Kentucky, Kentucky's Plan administrator, and other state entities (to whom we shall refer collectively as "Kentucky"). The EEOC pointed out that, if Lickteig had become disabled before he reached the age of 55, the Plan, in calculating Lickteig's benefits, would have imputed a number of additional years. And the EEOC argued that the Plan failed to impute years solely because Lickteig became disabled after he reached age 55.

The District Court, making all appropriate evidence-related assumptions in the EEOC's favor, see Fed. Rule Civ. Proc. 56, held that the EEOC could not establish age discrimination; and it granted summary judgment in the defendants' favor. A panel of the Sixth Circuit affirmed that

judgment. *EEOC* v. *Jefferson Cty. Sheriff's Dept.*, 424 F. 3d 467 (2005). The Sixth Circuit then granted rehearing en banc, held that Kentucky's Plan *did* violate the ADEA, and reversed and remanded for further proceedings. 467 F. 3d 571 (2006).

Kentucky sought certiorari. In light of the potentially serious impact of the Circuit's decision upon pension benefits provided under plans in effect in many States, we granted the writ. See, *e. g.*, Ind. Code §§36–8–8–13.3(b) and (c) (West 2004); Mich. Comp. Laws Ann. §§38.23 and 38.556(2)(d) (West 2005); N. C. Gen. Stat. Ann. §§135–1 and 135–5 (Lexis 2007); 71 Pa. Cons. Stat. §§5102 and 5704 (2001 and Supp. 2007); Tenn. Code Ann. §8–36–501(c)(3) (Supp. 2007). See also Reply Brief for Petitioners 20–21 (predicting, *inter alia*, large increase in pension liabilities, potential reduction in benefits for all disabled persons, or both); Brief for National Association of State Retirement Administrators et al. as *Amici Curiae* 8–14 (same).

II

The ADEA forbids an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*." 29 U. S. C. §623(a)(1) (emphasis added). In *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604 (1993), the Court explained that where, as here, a plaintiff claims age-related "disparate treatment" (*i. e.*, *intentional* discrimination "because of . . . age") the plaintiff must prove that age "*actually motivated* the employer's decision." *Id.*, at 610 (emphasis added); see also *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 141 (2000). The Court noted that "[t]he employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment" because of age, or "the employer may have been motivated by [age] on an ad hoc, informal basis." *Hazen Paper*, 507 U. S., at

610. But "[w]hatever the employer's decisionmaking process," a plaintiff alleging disparate treatment cannot succeed unless the employee's age "*actually played a role in that process and had a determinative influence on the outcome.*" *Ibid.* (emphasis added). Cf. *Smith* v. *City of Jackson*, 544 U. S. 228, 239–240 (2005) (plurality opinion) (describing "disparate-impact" theory, not here at issue, which focuses upon unjustified discriminatory results).

In *Hazen Paper*, the Court considered a disparate-treatment claim that an employer had unlawfully dismissed a 62-year-old employee with over 9½ years of service in order to avoid paying pension benefits that would have vested after 10 years. The Court held that, without more evidence of intent, the ADEA would not forbid dismissal of the claim. A dismissal based on pension status was not a dismissal "because of . . . age." 507 U. S., at 611–612. Of course, pension status depended upon years of service, and years of service typically go hand in hand with age. *Id.*, at 611. But the two concepts were nonetheless "analytically distinct." *Ibid.* An employer could easily "take account of one while ignoring the other." *Ibid.* And the dismissal in question, if based purely upon pension status (related to years of service), would not embody the evils that led Congress to enact the ADEA in the first place: The dismissal was not based on a "prohibited stereotype" of older workers, did not produce any "attendant stigma" to those workers, and was not "the result of an inaccurate and denigrating generalization about age." *Id.*, at 612.

At the same time, *Hazen Paper* indicated that discrimination on the basis of pension status could *sometimes* be unlawful under the ADEA, in particular where pension status served as a "proxy for age." *Id.*, at 613. Suppose, for example, an employer "target[ed] employees with a particular pension status on the assumption that these employees are likely to be older." *Id.*, at 612–613. In such a case, *Hazen Paper* suggested, age, not pension status, would have "ac-

tually motivated" the employer's decisionmaking. *Hazen Paper* also left open "the special case where an employee is about to vest in pension benefits as a result of his *age*, rather than years of service." *Id.*, at 613. We here consider a variation on this "special case" theme.

III

Kentucky's Plan turns normal pension eligibility *either* upon the employee's having attained 20 years of service alone *or* upon the employee's having attained 5 years of service and reached the age of 55. The ADEA permits an employer to condition pension eligibility upon age. See 29 U. S. C. §623(*l*)(1)(A)(i) (2006 ed.). Thus we must decide whether a plan that (1) lawfully makes age in part a condition of pension eligibility, and (2) treats workers differently in light of their pension status, (3) *automatically* discriminates *because of* age. The Government argues "yes." But, following *Hazen Paper*'s approach, we come to a different conclusion. In particular, the following circumstances, taken together, convince us that, in this particular instance, differences in treatment were not "actually motivated" by age.

First, as a matter of pure logic, age and pension status remain "analytically distinct" concepts. *Hazen Paper*, 507 U. S., at 611. That is to say, one can easily conceive of decisions that are actually made "because of" pension status and not age, even where pension status is itself based on age. Suppose, for example, that an employer pays all retired workers a pension, retirement eligibility turns on age, say, 65, and a 70-year-old worker retires. Nothing in language or in logic prevents one from concluding that the employer has begun to pay the worker a pension, not because the worker is over 65, but simply because the worker has retired.

Second, several background circumstances eliminate the possibility that pension status, though analytically distinct from age, nonetheless serves as a "proxy for age" in Ken-

tucky's Plan. Cf. *id.*, at 613. We consider not an individual employment decision, but a set of complex systemwide rules. These systemic rules involve, not wages, but pensions—a benefit that the ADEA treats somewhat more flexibly and leniently in respect to age. See, *e. g.*, 29 U. S. C. §623(*l*)(1)(A)(i) (explicitly allowing pension eligibility to turn on age); §623(*l*)(2)(A) (allowing employer to consider (age-related) pension benefits in determining level of severance pay); §623(*l*)(3) (allowing employer to consider (age-related) pension benefits in determining level of long-term disability benefits). And the specific benefit at issue here is offered to all hazardous position workers on the same nondiscriminatory terms *ex ante*. That is to say, every such employee, when hired, is promised disability retirement benefits should he become disabled prior to the time that he is eligible for normal retirement benefits.

Furthermore, Congress has otherwise approved of programs that calculate permanent disability benefits using a formula that expressly takes account of age. For example, the Social Security Administration now uses such a formula in calculating Social Security Disability Insurance benefits. See, *e. g.*, 42 U. S. C. §415(b)(2)(B)(iii); 20 CFR §404.211(e) (2007). And until (and in some cases after) 1984, federal employees received permanent disability benefits based on a formula that, in certain circumstances, did not just consider age, but effectively imputed years of service only to those disabled workers younger than 60. See 5 U. S. C. §8339(g) (2006 ed.); see also Office of Personnel Management, Disability Retirement Under the Civil Service Retirement System, Retirement Facts 4, p. 3 (rev. Nov. 1997), online at http://www.opm.gov/forms/pdfimage/RI83-4.pdf (as visited June 16, 2008, and available in Clerk of Court's case file).

Third, there is a clear non-age-related rationale for the disparity here at issue. The manner in which Kentucky calculates disability retirement benefits is in every important respect but one identical to the manner in which Kentucky

calculates normal retirement benefits. The one significant difference consists of the fact that the Plan imputes additional years of service to disabled individuals. But the Plan imputes *only* those years needed to bring the disabled worker's years of service to 20 or to the number of years that the individual would have worked had he worked to age 55. The disability rules clearly track Kentucky's normal retirement rules.

It is obvious, then, that the whole purpose of the disability rules is, as Kentucky claims, to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits. Age factors into the disability calculation only because the normal retirement rules themselves permissibly include age as a consideration. No one seeking to help disabled workers in the way that Kentucky's rules seek to help those workers would care whether Kentucky's normal system turned eligibility in part upon age or upon other, different criteria.

That this is so is suggested by the fact that one can readily construct a plan that produces an identical disparity but is age neutral. Suppose that Kentucky's Plan made eligible for a pension (1) day-shift workers who have 20 years of service, and (2) night-shift workers who have 15 years of service. Suppose further that the Plan calculates the amount of the pension the same way in either case, which method of calculation depends solely upon years of service (say, giving the worker a pension equal to $1,000 for each year of service). If the Plan were then to provide workers who become disabled prior to pension eligibility the same pension the workers would have received had they worked until they became pension eligible, the Plan would create a disparity between disabled day-shift and night-shift workers: A day-shift worker who becomes disabled *before* becoming pension eligible would, in many instances, end up receiving a bigger pension than a night-shift worker who becomes disabled *after* becoming pension eligible. For example, a

day-shift worker who becomes disabled prior to becoming pension eligible would receive an annual pension of $20,000, while a night-shift worker who becomes disabled after becoming pension eligible, say, after 16 years of service, would receive an annual pension of $16,000.

The disparity in this example is not "actually motivated" by bias against night-shift workers. Rather, such a disparity, like the disparity in the case before us, is simply an artifact of Plan rules that treat one set of workers more generously in respect to the *timing of their eligibility for normal retirement benefits* but which do not treat them more generously in respect to the *calculation of the amount* of their normal retirement benefits. The example helps to show that the Plan at issue in this case simply seeks to treat disabled employees as if they had worked until the point at which they would be eligible for a normal pension. The disparity turns upon pension eligibility and nothing more.

Fourth, although Kentucky's Plan placed an older worker at a disadvantage in this case, in other cases, it can work to the *advantage* of older workers. Consider, for example, two disabled workers, one of whom is aged 45 with 10 years of service, one of whom is aged 40 with 15 years of service. Under Kentucky's scheme, the older worker would actually get a bigger boost of imputed years than the younger worker (10 years would be imputed to the former, while only 5 years would be imputed to the latter). And that fact helps to confirm that the underlying motive is not an effort to discriminate "because of . . . age."

Fifth, Kentucky's system does not rely on any of the sorts of stereotypical assumptions that the ADEA sought to eradicate. It does not rest on any stereotype about the work capacity of "older" workers *relative to* "younger" workers. See, *e. g.*, *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 590 (2004) (noting that except on one point, all the findings and statements of objectives in the ADEA are

"either cast in terms of the effects of age as intensifying over time, or are couched in terms that refer to 'older' workers, explicitly or implicitly *relative to* 'younger' ones" (emphasis added)). The Plan does assume that all disabled workers would have worked to the point at which they would have become eligible for a pension. It also assumes that no disabled worker would have continued working beyond the point at which he was both (1) disabled and (2) pension eligible. But these "assumptions" do not involve age-related stereotypes, and they apply equally to *all* workers, regardless of age.

Sixth, the nature of the Plan's eligibility requirements means that, unless Kentucky were severely to cut the benefits given to disabled workers who are not yet pension eligible (which Kentucky claims it will do if its present Plan is unlawful), Kentucky would have to increase the benefits available to disabled, pension-eligible workers, while lacking any clear criteria for determining how many extra years to impute for those pension-eligible workers who already are 55 or older. The difficulty of finding a remedy that can both correct the disparity and achieve the Plan's legitimate objective—providing each disabled worker with a sufficient retirement benefit, namely, the normal retirement benefit that the worker would receive if he were pension eligible at the time of disability—further suggests that this objective and not age "actually motivated" the Plan.

The above factors all taken together convince us that the Plan does not, on its face, create treatment differences that are "actually motivated" by age. And, for present purposes, we accept the District Court's finding that the Government has pointed to no additional evidence that might permit a factfinder to reach a contrary conclusion. See App. 28–30.

It bears emphasizing that our opinion in no way unsettles the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the

ADEA. We are dealing today with the quite special case of differential treatment based on *pension status*, where pension status—with the explicit blessing of the ADEA—itself turns, in part, on age. Further, the rule we adopt today for dealing with this sort of case is clear: Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate-treatment claim under the ADEA, must come forward with sufficient evidence to show that the differential treatment was "actually motivated" by *age*, not pension status. And our discussion of the factors that lead us to conclude that the Government has failed to make the requisite showing in this case provides an indication of what a plaintiff might show in other cases to meet his burden of proving that differential treatment based on pension status is in fact discrimination "because of" age.

IV

The Government makes two additional arguments. First, it looks for support to an amendment that Congress made to the ADEA after this Court's decision in *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158 (1989). In *Betts*, the employer denied a worker disability benefits on the ground that its bona fide benefit program provided disability benefits only to workers who became disabled prior to age 60, and the worker in that case became disabled at age 61. *Id.*, at 163. The ADEA at that time exempted from its prohibitions employment decisions taken pursuant to the terms of "'any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of' the Act." *Id.*, at 161 (quoting 29 U. S. C. §623(f)(2) (1982 ed.)). And the Court held that the employer's decision fell within that exception. 492 U. S., at 182. Subsequently Congress amended the ADEA to make clear that it covered age-based discrimination in respect to all employee benefits. See Older Workers Benefit Protection Act, §102, 104 Stat. 978,

29 U. S. C. § 630(*l*) (2000 ed.). Congress replaced the "not a subterfuge" exception with a provision stating that age-based disparities in the provision of benefits are lawful only when they are justified in respect to cost savings. *Id.*, at 978–979, 29 U. S. C. § 623(f)(2)(B)(i).

We agree with the Government that the amendment broadened the field of employer actions subject to antidiscrimination rules and it narrowed the statutorily available justifications for age-related differences. But these facts cannot help the Government here. We do not dispute that ADEA prohibitions apply to the Plan at issue, and our basis for finding the Plan lawful does not rest upon amendment-related justifications. Rather, we find that the discrimination is not "actually motivated" by age. Thus *Hazen Paper*, not *Betts*, provides relevant precedent. And the amendment cited by the Government is beside the point.

Second, the Government says that we must defer to a contrary EEOC interpretation contained in an EEOC regulation and compliance manual. The regulation, however, says only that providing "the same level of benefits to older workers as to younger workers" does *not* violate the Act. 29 CFR § 1625.10(a)(2) (2007). The Government's interpretation of this language is not entitled to deference because, on its face, the regulation "does little more than restate the terms of the statute itself." *Gonzales* v. *Oregon*, 546 U. S. 243, 257 (2006) (denying deference to an agency interpretation of its own regulation in light of the "near equivalence" of the statute and regulation).

The compliance manual provides more explicitly that benefits are not "equal" insofar as a plan "reduces or eliminates benefits based on a criterion that is explicitly defined (in whole or in part) by age." 2 EEOC Compliance Manual § 3, p. 627:0004 (2001) (bold typeface deleted). And the compliance manual further provides that "[b]asing disability retirement benefits on the number of years a disabled employee *would have worked* until normal retirement age by definition

gives more constructive years of service to younger than to older employees" and thus violates the Act. See *id.*, at 627:0010.

These statements, while important, cannot lead us to a different conclusion. See *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 111, n. 6 (2002) (noting that compliance manuals are "'"entitled to respect" under our decision in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)'"); see also *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000). Following *Hazen Paper*, we interpret the Act as requiring a showing that the discrimination at issue "actually motivated" the employer's decision. Given the reasons set forth in Part III, *supra*, we conclude that evidence of that motivation was lacking here. And the EEOC's statement in the compliance manual that it automatically reaches a contrary conclusion—a statement that the manual itself makes little effort to justify—lacks the necessary "power to persuade" us. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

V

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE ALITO join, dissenting.

The Court today ignores established rules for interpreting and enforcing one of the most important statutes Congress has enacted to protect the Nation's work force from age discrimination, the Age Discrimination in Employment Act of 1967 (ADEA or Act), 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.* That Act prohibits employment actions that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." §623(a)(1). In recent years employers and employees alike have been advised by this Court, by most Courts of Appeals, and by the agency

charged with enforcing the Act, the Equal Employment Opportunity Commission (EEOC), that the most straightforward reading of the statute is the correct one: When an employer makes age a factor in an employee benefit plan in a formal, facial, deliberate, and explicit manner, to the detriment of older employees, this is a violation of the Act. Disparate treatment on the basis of age is prohibited unless some exemption or defense provided in the Act applies.

The Court today undercuts this basic framework. In doing so it puts the Act and its enforcement on a wrong course. The decision of the en banc panel of the Court of Appeals for the Sixth Circuit, which the Court reverses, brought that Circuit's case law into line with that of its sister Circuits. See *EEOC* v. *Jefferson Cty. Sheriff's Dept.*, 467 F. 3d 571, 573 (2006) (overturning *Lyon* v. *Ohio Ed. Assn. and Professional Staff Union*, 53 F. 3d 135 (1995)); see also, *e. g.*, *Jankovitz* v. *Des Moines Independent Community School Dist.*, 421 F. 3d 649, 653–655 (CA8 2005); *Abrahamson* v. *Board of Ed. of Wappingers Falls Central School Dist.*, 374 F. 3d 66, 72–73 (CA2 2004); *Arnett* v. *California Public Employees Retirement System*, 179 F. 3d 690, 695–697 (CA9 1999); *Auerbach* v. *Board of Ed. of Harborfields Central School Dist. of Greenlawn*, 136 F. 3d 104, 109–114 (CA2 1998); *Huff* v. *UARCO, Inc.*, 122 F. 3d 374, 387–388 (CA7 1997). By embracing the approach rejected by the en banc panel and all other Courts of Appeals that have addressed this issue, this Court creates unevenness in administration, unpredictability in litigation, and uncertainty as to employee rights once thought well settled. These consequences, and the Court's errors in interpreting the statute and our cases, require this respectful dissent.

Even were the Court correct that Kentucky's facially discriminatory disability benefits plan can be justified by a proper motive, the employer's own submission to us reveals that the plan's discriminatory classification rests upon a stereotypical assumption that itself violates the Act and the Court's own analytical framework.

As a threshold matter, all should concede that the paradigm offered to justify the statute is a powerful one: The young police officer or firefighter with a family is disabled in the heroic performance of his or her duty. Disability payments are increased to account for unworked years of service. What the Court overlooks, however, is that a 61-year-old officer or firefighter who is disabled in the same heroic action receives, in many instances, a lower payment and for one reason alone: By explicit command of Kentucky's disability plan age is an express disadvantage in calculating the disability payment.

This is a straightforward act of discrimination on the basis of age. Though the Commonwealth is entitled by the law, in some instances, to defend an age-based differential as cost justified, 29 U. S. C. § 623(f)(2)(B)(ii), that has yet to be established here. What an employer cannot do, and what the Court ought not to do, is to pretend that this explicit discrimination based on age is somehow consistent with the broad statutory and regulatory prohibition against disparate treatment based on age.

I

The following appears to be common ground for both sides of the dispute: Kentucky operates dual retirement systems for employees in hazardous occupations. An employee is eligible for normal retirement if he or she has accumulated 20 years of service with the Commonwealth, or is over age 55 and has accumulated at least 5 years of service. If the employee can no longer work as a result of a disability, however, he or she is entitled to receive disability retirement. Employees who are eligible for normal retirement benefits are ineligible for disability retirement. See Ky. Rev. Stat. Ann. §§ 16.576, 16.577(2) (Lexis 2003), 61.592(4) (Lexis Cum. Supp. 2003).

The distinction between normal and disability retirement is not just a difference of nomenclature. Under the normal retirement system benefits are calculated by multiplying a

percentage of the employee's pay at retirement by years of service. See § 16.576(3) (Lexis 2003). Under the disability system the years-of-service multiplier includes not only the employee's actual years of service but also the number of years it would have taken the employee to become eligible for normal retirement (subject to a cap equal to the number of actual years served). See § 16.582(5)(a). In other words employees in the normal retirement system are compensated based solely on their actual years of service; but employees in the disability retirement system get a bonus, which accounts for the number of years the employee would have worked had he or she remained healthy until becoming eligible to receive normal retirement benefits.

Whether intended or not, the result of these divergent benefits formulae is a system that, in some cases, compensates otherwise similarly situated individuals differently on the basis of age. Consider two covered workers, one 45 and one 55, both with five years of service with the Commonwealth and an annual salary of $60,000. If we assume both become disabled in the same accident, the 45-year-old will be entitled to receive $1,250 in monthly benefits; the 55-year-old will receive $625, just half as much. The benefit disparity results from the Commonwealth's decision, under the disability retirement formula, to credit the 45-year-old with 5 years of unworked service (thereby increasing the appliable years-service-multiplier to 10 years), while the 55-year-old's benefits are based only on actual years of service (5 years). In that instance age is the only factor that accounts for the disparate treatment.

True, age is not a factor that reduces benefits in every case. If a worker has accumulated 20 years of service with the Commonwealth before he or she becomes disabled, age plays no role in the benefits calculation. But there is no question that, in many cases, a disabled worker over the age of 55 who has accumulated fewer than 20 years of service receives a lower monthly stipend than otherwise simi-

larly situated workers who are under 55. The Court concludes this result is something other than discrimination on the basis of age only by ignoring the statute and our past opinions.

II

It is difficult to find a clear rule of law in the list of policy arguments the Court makes to justify its holding. The difficulty is compounded by the Court's own analysis. The Court concedes that, in this case, Kentucky's plan "placed an older worker at a disadvantage," *ante*, at 146; yet it proceeds to hold that the Commonwealth's disparate treatment of its workers was not "'actually motivated' by age," *ante*, at 147. The Court's apparent rationale is that, even when it is evident that a benefits plan discriminates on its face on the basis of age, an ADEA plaintiff still must provide additional evidence that the employer acted with an "underlying motive," *ante*, at 146, to treat older workers less favorably than younger workers.

The Court finds no support in the text of the statute. In the wake of *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158 (1989), where the Court held that bona fide employee benefit plans were exempt from the coverage of the ADEA, Congress amended the Act to provide that an employee benefit plan that discriminates on the basis of age is unlawful, except when the employer establishes entitlement to one of the affirmative defenses Congress has provided. See Older Workers Benefit Protection Act (OWBPA), 104 Stat. 978, codified at 29 U. S. C. §623(f). As a result of the OWBPA, an employer cannot operate an employee benefit plan in a manner that "discriminate[s] against any individual . . . because of such individual's age," §623(a)(1), except when the plan is a "voluntary early retirement incentive plan" or when "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker," §§623(f)(2)(B)(i)–(ii); see generally B. Lindemann & D.

Kadue, Age Discrimination in Employment Law 175 (2003). Under any common understanding of the statute's terms a disability plan that pays older workers less than younger workers on the basis of age "discriminate[s] . . . because of . . . age." That is how the agency that administers the statute, the EEOC, understands it. See 2 EEOC Compliance Manual §3, p. 627:0004 (2001) ("[B]enefits will not be equal where a plan reduces or eliminates benefits based on a criterion that is explicitly defined (in whole or in part) by age" (bold typeface deleted)). And the employer here has not shown that any of the affirmative defenses or exemptions to the Act applies. That should be the end of the matter; the employer is liable unless it can make such a showing.

The Court's holding stems, it asserts, from a statement in *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604 (1993), that an employment practice discriminates only if it is "'actually motivated'" by the protected trait. *Ante*, at 141 (quoting *Hazen Paper*, 507 U. S., at 610; emphasis deleted). If this phrase had been used without qualification, the Court's interpretation of it might have been justified. If one reads the relevant passage in full (with particular emphasis on the second sentence), however, *Hazen Paper* makes quite clear that no additional proof of motive is required in an ADEA case once the employment policy at issue is deemed discriminatory on its face. The Court said this:

> "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. See, *e. g.*, *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711 (1983); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 252–256 (1981); *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 576–578 (1978). The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. See, *e. g.*, [*Trans World Airlines, Inc.* v.] *Thurston*, [469 U. S. 111 (1985)]; *Los*

> *Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 704–718 (1978). Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. See, *e. g.*, *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985); *Teamsters* [v. *United States*, 431 U. S. 324, 334–343 (1977)]. Whatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Ibid.*

In context the paragraph identifies a decision made in reliance on a "facially discriminatory policy requiring adverse treatment of employees with [a protected] trait" as a type of employment action that is "actually motivated" by that trait. By interpreting *Hazen Paper* to say that a formal, facial, explicit, mandated, age-based differential does not suffice to establish a disparate-treatment violation (subject to statutory defenses and exemptions), it misconstrues the precedent upon which its entire theory of this case is built. The Court was right in *Hazen Paper* and is wrong here.

At a minimum the Court should not cite *Hazen Paper* to support what it now holds. Its conclusion that no disparate-treatment violation has been established here conflicts with the longstanding rule in ADEA cases. The rule—confirmed by the quoted text in *Hazen Paper*—is that once the plaintiff establishes that a policy discriminates on its face, no additional proof of a less-than-benign motive for the challenged employment action is required. For if the plan discriminates on its face, it is obvious that decisions made pursuant to the plan are "actually motivated" by age. The EEOC (or the employee) must prevail unless the employer can justify its action under one of the enumerated statutory defenses or exemptions.

Two cases cited in *Hazen Paper* as examples of "formal, facially discriminatory polic[ies]" stand for this proposition. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111

(1985); *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978).

In *Thurston*, the Court considered whether Trans World Airlines' transfer policy for older pilots violated the ADEA. The policy allowed pilots to continue working for the airline past the mandatory retirement age of 60 if they transferred to the position of flight engineer. 469 U. S., at 115–116. But the 60-year-old pilot had to bid for the position. Under the bid procedures a pilot who became ineligible to remain at the controls on account of a disability (or even outright incompetence) had priority over a pilot forced out due to age. *Id.*, at 116–117. The Court held the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), which is used to determine whether there was a discriminatory motive at play, had no application because the policy was "discriminatory on its face." 469 U. S., at 121.

Manhart, a case brought under Title VII of the Civil Rights Act of 1964, involved a municipal employees' retirement plan that forced female employees to make larger contributions than their male counterparts. The Court noted that even if there were no evidence that the policy had a discriminatory "effect," "that evidence does not defeat the claim that the practice, on its face, discriminated against every individual woman employed by the Department." 435 U. S., at 716.

Just as the majority misunderstands *Hazen Paper*'s reference to employment practices that are "actually motivated" by age, so too does it overstate what the *Hazen Paper* Court meant when it observed that pension status and age are "analytically distinct." 507 U. S., at 611. The Court now reads this language as creating a virtual safe harbor for policies that discriminate on the basis of pension status, even when pension status is tied directly to age and then linked to another type of benefit program. The *Hazen Paper* Court did not allow, or support, this result. In *Hazen Paper*, pension status and age were "analytically distinct" because the em-

ployee's eligibility to receive a pension formally had nothing to do with age; pension status was tied solely to years of service. The Court recognized that age and pension status were correlated (because older workers were more likely to be pension eligible); but the Court found the plan to be facially neutral with regard to age precisely because age and pension status were not expressly linked under the terms of the plan. See *id.*, at 613 (noting that "we do not consider the special case where an employee is about to vest in pension benefits as a result of his *age*, rather than years of service"). In order to prove disparate-treatment liability the *Hazen Paper* Court held that the plaintiff needed to provide additional evidence that his termination in fact was motivated by age. *Id.*, at 613–614.

The saving feature that was controlling in *Hazen Paper* is absent here. This case is the opposite of *Hazen Paper*. Here the age distinction is active and present, not superseded and absent. Age is a determining factor of pension eligibility for all workers over the age of 55 who have over 5 (but less than 20) years of service; and pension status, in turn, is used to determine eligibility for disability benefits. For these employees, pension status and age are not "analytically distinct" in any meaningful sense; they merge into one category. When it treats these employees differently on the basis of pension eligibility, Kentucky facially discriminates on the basis of age. Were this not the case, there would be no facial age discrimination if an employer divided his employees into two teams based upon age—putting all workers over the age of 65 on "Team A" and all other workers on "Team B"—and then paid Team B members twice the salary of their Team A counterparts, not on the basis of age (the employer would declare) but of team designation. Neither *Hazen Paper* nor the plain text of the ADEA can be read to permit this result.

The closest the Court comes to reconciling its holding with the actual text of the statute is its citation to the Act's ex-

emption allowing employers to condition pension eligibility on age. *Ante*, at 144. Of course, the fact that it invokes an exemption is a concession by the Court that the Act otherwise would condemn the age-based classification Kentucky's disability plan makes. But the exemption provides no support for the Court's holding in any event. Its coverage is limited to "employee pension benefit plan[s] [that] provid[e] for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits." See 29 U. S. C. §623(*l*)(1)(A)(i). There is no further reaching exemption for subsequent employment decisions based upon pension eligibility. And to the extent the Court finds such a loophole to be implicit in the text of the statute, a disability benefits program of the sort at issue here is not the only type of employment policy that fits through it. If the ADEA allows an employer to tie disability benefits to an age-based pension status designation, that same designation can be used to determine wages, hours, health care benefits, reimbursements, job assignments, promotions, office space, transportation vouchers, parking privileges, and any other conceivable benefit or condition of employment.

III

The Court recognizes some of the difficulties with its position and seeks to limit its holding, yet it does so in ways not permitted by statute or our previous employment discrimination cases.

The Court notes that age is not the sole determining factor of pension eligibility but is instead just one factor embedded in a set of "complex systemwide rules." *Ante*, at 144. There is no suggestion in our prior ADEA cases, however, and certainly none in our related Title VII jurisprudence, that discrimination based on a protected trait is permissible if the protected trait is one among many variables.

This is quite evident when the protected trait is necessarily a controlling, outcome-determinative factor in calculating

employee benefits. In *Manhart*, for instance, sex was not the only factor determining how much an employee was required to contribute to the pension plan on a monthly basis; the employee's salary, age, and length of service were also variables in the equation. 435 U. S., at 705; Brief for Petitioners in *Los Angeles Dept. of Water and Power* v. *Manhart*, O. T. 1977, No. 76–1810, p. 23. And even though the employer's decision to require higher contributions from female employees was based upon an actuarially sound premise—that women have longer life expectancies than men—the Court held that the plan discriminated on its face. 435 U. S., at 711.

Similarly, we have said that the ADEA's substantive prohibitions, which were "derived *in haec verba* from Title VII," *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978), require the employer "to ignore an employee's age (absent a statutory exemption or defense)," *Hazen Paper*, 507 U. S., at 612. This statement perhaps has been qualified by the Court's subsequent holding in *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581 (2004), that the ADEA does not prohibit employers from discriminating in favor of older workers to the detriment of younger workers. Reasonable minds may have disagreed about the merits of *Cline*'s holding. See *id.*, at 601 (SCALIA, J., dissenting); see also *id.*, at 602 (THOMAS, J., dissenting). But *Cline* does not dictate the path the Court chooses here. For it is one thing to interpret a statute designed to combat age discrimination in a way that benefits older workers to the detriment of younger workers; it is quite another to do what the Court does in this case, which is to interpret the ADEA to allow a discriminatory employment practice that disfavors older workers while favoring younger ones. The Court, moreover, achieved the result in *Cline* by reading the word "age" to mean "old age"—*i. e.*, by reading "discriminat[ion] . . . because of [an] individual's age," 29 U. S. C. §623(a)(1), to mean discrimination because of an individual's advanced age. See *Cline*, *supra*, at 596. Here the Court seems to adopt a new definition of the term "dis-

criminate" by holding that there is no discrimination on the basis of a protected trait if the trait is one among several factors that bear upon how an employee is treated. There is no principled way to draw this distinction, and the Court does not attempt to do so. Cf. *Manhart*, *supra*, at 710 ("[T]here is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage").

The Court recites what it sees as "several background circumstances [that] eliminate the possibility that pension status, though analytically distinct from age, nonetheless serves as a 'proxy for age' in Kentucky's Plan." *Ante*, at 143–144. Among these is a "clear non-age-related rationale," *ante*, at 144, "to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits," *ante*, at 145. There is a difference, however, between a laudable purpose and a rule of law.

An otherwise discriminatory employment action cannot be rendered lawful because the employer's motives were benign. In *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187 (1991), the employer had a policy barring all female employees, except those who were infertile, from performing jobs that exposed them to lead. The employer said its policy was designed not to reinforce negative gender stereotypes but to protect female employees' unborn children against the risk of birth defects. *Id.*, at 191. The argument did not prevail. The plan discriminated on its face on the basis of sex, and the employer did not establish a bona fide occupational qualification defense. As a result, the Court held that the restriction violated Title VII. "[T]he absence of a malevolent motive [did] not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Id.*, at 199.

Still, even if our cases allowed the motive qualification the Court puts forth to justify a facial and operative distinction based upon age, the plan at issue here does not survive the

Court's own test. We need look no further than the Commonwealth's own brief for evidence that its motives are contrary to the ADEA. In its brief the Commonwealth refers to the 61-year-old complainant in this case, Charles Lickteig, as follows:

> "An employee in Mr. Lickteig's position has had an extra 21 years to devote to making money, providing for himself and his family, saving funds for retirement, and accruing years that will increase his retirement benefits. Thus, the 40-year-old employee is likely to need more of a boost." Brief for Petitioners 23.

The hypothetical younger worker seems entitled to a boost only if one accepts that the younger worker had more productive years of work left in him at the time of his injury than Lickteig did. As an actuarial matter, this assumption may be sound. It is an impermissible basis for differential treatment under the ADEA, however. As we said in *Hazen Paper*, the idea that "productivity and competence decline with old age" is the "very essence of age discrimination." 507 U. S., at 610. By forbidding age discrimination against any "individual," 29 U. S. C. §623(a), the ADEA prohibits employers from using the blunt tool of age to assess an employee's future productivity. Cf. *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 409 (1985) (noting the Labor Department's findings that "the process of psychological and physiological degeneration caused by aging varies with each individual"). Whether this is good public policy in all instances might be debatable. Until Congress sees fit to change the language of the statute, however, there is no principled basis for upholding Kentucky's disability benefits formula.

* * *

As explained in this dissent, Kentucky's disability retirement plan violates the ADEA, an Act intended to promote the interests of older Americans. Yet it is no small irony that it does so, at least in part, because the Commonwealth's

normal retirement plan treats older workers in a particularly generous fashion. Kentucky allows its employees to retire at the age of 55 if they have accumulated only five years of service. But for this provision, which links age and years of service in a way that benefits older workers, pension eligibility would be a function solely of tenure, not age. Accordingly, this case would be more like *Hazen Paper*, and the EEOC's case would be much weaker. Similarly, as the Court notes, *ante*, at 147, Kentucky could avoid any problems by not imputing unworked years of service to any disabled workers, old and young alike. Neither change to the plan would result in more generous treatment for older workers. The only difference would be that, under the first example, older workers would lose the option of early retirement, and, under the second, younger workers would see their benefits cut. These are not the only possible remedies—the Commonwealth could impute unworked years of service to all employees forced into retirement on account of a disability regardless of age.

The Court's desire to avoid construing the ADEA in a way that encourages the Commonwealth to eliminate its early retirement program or to reduce benefits to the policemen and firefighters who are covered under the disability plan is understandable. But, under our precedents, "'[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all.'" *Thurston*, 469 U. S., at 121 (quoting *Hishon* v. *King & Spalding*, 467 U. S. 69, 75 (1984)). If Kentucky's facially discriminatory plan is good public policy, the answer is not for this Court to ignore its precedents and the plain text of the statute.

For these reasons, in my view, the judgment of the Court of Appeals should be affirmed and the case remanded for a determination whether the Commonwealth can assert a cost-justification defense.

Syllabus

INDIANA *v.* EDWARDS

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 07–208. Argued March 26, 2008—Decided June 19, 2008

After Indiana charged respondent Edwards with attempted murder and other crimes for a shooting during his attempt to steal a pair of shoes, his mental condition became the subject of three competency proceedings and two self-representation requests, mostly before the same trial judge. Referring to the lengthy record of psychiatric reports, the trial court noted that Edwards suffered from schizophrenia and concluded that, although it appeared he was competent to stand trial, he was not competent to defend himself at trial. The court therefore denied Edwards' self-representation request. He was represented by appointed counsel at trial and convicted on two counts. Indiana's intermediate appellate court ordered a new trial, agreeing with Edwards that the trial court's refusal to permit him to represent himself deprived him of his constitutional right of self-representation under the Sixth Amendment and *Faretta* v. *California*, 422 U. S. 806. Although finding that the record provided substantial support for the trial court's ruling, the Indiana Supreme Court nonetheless affirmed the intermediate appellate court on the ground that *Faretta* and *Godinez* v. *Moran*, 509 U. S. 389, required the State to allow Edwards to represent himself.

Held: The Constitution does not prohibit States from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. Pp. 169–179.

(a) This Court's precedents frame the question presented, but they do not answer it. *Dusky* v. *United States*, 362 U. S. 402, and *Drope* v. *Missouri*, 420 U. S. 162, 171, set forth the Constitution's "mental competence" standard forbidding the trial of an individual lacking a rational and factual understanding of the proceedings and sufficient ability to consult with his lawyer with a reasonable degree of rational understanding. But those cases did not consider the issue presented here, namely, the relation of that "mental competence" standard to the self-representation right. Similarly the Court's foundational "self-representation" case, *Faretta*, *supra*—which held that the Sixth and Fourteenth Amendments include a "constitutional right to proceed *without* counsel when" a criminal defendant "voluntarily and intelligently elects to do so," 422 U. S., at 807—does not answer the question as to the scope of the self-representation right. Finally, although *Godinez*,

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supra, presents a question closer to the one at issue in that it focused upon a borderline-competent defendant who had asked a state trial court to permit him to represent himself and to change his pleas from not guilty to guilty. *Godinez* provides no answer here because that defendant's ability to conduct a defense at trial was expressly not at issue in that case, see 509 U. S., at 399–400, and because the case's constitutional holding that a State may *permit* a gray-area defendant to represent himself does not tell a State whether it may *deny* such a defendant the right to represent himself at his trial. Pp. 169–174.

(b) Several considerations taken together lead the Court to conclude that the Constitution permits a State to limit a defendant's self-representation right by insisting upon trial counsel when the defendant lacks the mental competency to conduct his trial defense unless represented. First, the Court's precedent, while not answering the question, points slightly in that direction. By setting forth a standard that focuses directly upon a defendant's ability to consult with his lawyer, *Dusky* and *Drope* assume representation by counsel and emphasize counsel's importance, thus suggesting (though not holding) that choosing to forgo trial counsel presents a very different set of circumstances than the mental competency determination for a defendant to stand trial. Also, *Faretta* rested its self-representation conclusion in part on pre-existing state cases that are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right. See 422 U. S., at 813, and n. 9. Second, the nature of mental illness—which is not a unitary concept, but varies in degree, can vary over time, and interferes with an individual's functioning at different times in different ways—cautions against using a single competency standard to decide both whether a defendant who is represented can proceed to trial and whether a defendant who goes to trial must be permitted to represent himself. Third, a self-representation right at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel, see *McKaskle* v. *Wiggins*, 465 U. S. 168, 176–177, and may undercut the most basic of the Constitution's criminal law objectives, providing a fair trial. The trial judge—particularly one such as the judge in this case, who presided over one of Edwards' competency hearings and his two trials—will often prove best able to make more fine-tuned mental capacity decisions, tailored to the particular defendant's individualized circumstances. Pp. 174–178.

(c) Indiana's proposed standard, which would deny a criminal defendant the right to represent himself at trial if he cannot communicate coherently with the court or a jury, is rejected because this Court is uncertain as to how that standard would work in practice. The Court

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also declines Indiana's request to overrule *Faretta* because today's opinion may well remedy the unfair trial concerns previously leveled against the case. Pp. 178–179.

866 N. E. 2d 252, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and ALITO, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 179.

Thomas M. Fisher, Solicitor General of Indiana, argued the cause for petitioner. With him on the briefs were *Steve Carter*, Attorney General, and *Julie A. Brubaker*, *Justin F. Roebel*, and *Heather L. Hagan*, Deputy Attorneys General.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Clement*, *Assistant Attorney General Fisher*, and *William M. Jay*.

Mark T. Stancil argued the cause for respondent. With him on the brief were *David T. Goldberg*, *Daniel R. Ortiz*, and *Michael R. Fisher*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Marc Dann*, Attorney General of Ohio, *William P. Marshall*, Solicitor General, *Robert J. Krummen*, *Michael Dominic Menti*, and *Kimberly A. Olson*, Deputy Solicitors, and *Kelly A. Borchers*, Assistant Solicitor, and by the Attorneys General and other officials for their respective States as follows: *Troy King*, Attorney General of Alabama, *Talis J. Colberg*, Attorney General of Alaska, *Terry Goddard*, Attorney General of Arizona, *John W. Suthers*, Attorney General of Colorado, *Bill McCollum*, Attorney General of Florida, *Mark J. Bennett*, Attorney General of Hawaii, *Lisa Madigan*, Attorney General of Illinois, *Thomas J. Miller*, Attorney General of Iowa, *Stephen N. Six*, Attorney General of Kansas, *Michael A. Cox*, Attorney General of Michigan, *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *Catherine Cortez Masto*, Attorney General of Nevada, *Albert Lama*, Chief Deputy Attorney General of New Mexico, *Hardy Myers*, Attorney General of Oregon, *Thomas W. Corbett, Jr.*, Attorney General of Pennsylvania, *Henry McMaster*, Attorney General of South Carolina, *Mark L. Shurtleff*, Attorney General of Utah, and *Robert M. McKenna*, Attorney General of Washington; and for the American Bar

JUSTICE BREYER delivered the opinion of the Court.

This case focuses upon a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. We must decide whether in these circumstances the Constitution prohibits a State from insisting that the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself. See U. S. Const., Amdt. 6; *Faretta* v. *California*, 422 U. S. 806 (1975). We conclude that the Constitution does not forbid a State so to insist.

I

In July 1999, Ahmad Edwards, the respondent, tried to steal a pair of shoes from an Indiana department store. After he was discovered, he drew a gun, fired at a store security officer, and wounded a bystander. He was caught and then charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. His mental condition subsequently became the subject of three competency proceedings and two self-representation requests, mostly before the same trial judge:

1. *First Competency Hearing: August 2000.* Five months after Edwards' arrest, his court-appointed counsel asked for a psychiatric evaluation. After hearing psychiatrist and neuropsychologist witnesses (in February 2000 and again in August 2000), the court found Edwards incompetent to stand trial, App. 365a, and committed him to Logansport State Hospital for evaluation and treatment, see *id.*, at 48a–53a.

Association by *William H. Neukom*, *Jon May*, *Robert Buschel*, *John Parry*, and *Rory K. Little*.

Richard G. Taranto filed a brief for the American Psychiatric Association et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*; and for the National Association of Criminal Defense Lawyers by *Kevin P. Martin*, *Abigail K. Hemani*, *Dahlia S. Fetouh*, *William F. Sheehan*, and *Barbara Bergman*.

2. *Second Competency Hearing: March 2002.* Seven months after his commitment, doctors found that Edwards' condition had improved to the point where he could stand trial. *Id.*, at 63a–64a. Several months later, however, but still before trial, Edwards' counsel asked for another psychiatric evaluation. In March 2002, the judge held a competency hearing, considered additional psychiatric evidence, and (in April) found that Edwards, while "suffer[ing] from mental illness," was "competent to assist his attorneys in his defense and stand trial for the charged crimes." *Id.*, at 114a.

3. *Third Competency Hearing: April 2003.* Seven months later but still before trial, Edwards' counsel sought yet another psychiatric evaluation of his client. And, in April 2003, the court held yet another competency hearing. Edwards' counsel presented further psychiatric and neuropsychological evidence showing that Edwards was suffering from serious thinking difficulties and delusions. A testifying psychiatrist reported that Edwards could understand the charges against him, but he was "unable to cooperate with his attorney in his defense because of his schizophrenic illness"; "[h]is delusions and his marked difficulties in thinking make it impossible for him to cooperate with his attorney." *Id.*, at 164a. In November 2003, the court concluded that Edwards was not then competent to stand trial and ordered his recommitment to the state hospital. *Id.*, at 206a–211a.

4. *First Self-Representation Request and First Trial: June 2005.* About eight months after his commitment, the hospital reported that Edwards' condition had again improved to the point that he had again become competent to stand trial. *Id.*, at 228a–236a. And almost one year after that, Edwards' trial began. Just before trial, Edwards asked to represent himself. *Id.*, at 509a, 520a. He also asked for a continuance, which, he said, he needed in order to proceed *pro se*. *Id.*, at 519a–520a. The court refused the continuance. *Id.*, at 520a. Edwards then proceeded to trial

represented by counsel. The jury convicted him of criminal recklessness and theft but failed to reach a verdict on the charges of attempted murder and battery.

5. *Second Self-Representation Request and Second Trial: December 2005.* The State decided to retry Edwards on the attempted murder and battery charges. Just before the retrial, Edwards again asked the court to permit him to represent himself. *Id.*, at 279a–282a. Referring to the lengthy record of psychiatric reports, the trial court noted that Edwards still suffered from schizophrenia and concluded that "[w]ith these findings, he's competent to stand trial but I'm not going to find he's competent to defend himself." *Id.*, at 527a. The court denied Edwards' self-representation request. Edwards was represented by appointed counsel at his retrial. The jury convicted Edwards on both of the remaining counts.

Edwards subsequently appealed to Indiana's intermediate appellate court. He argued that the trial court's refusal to permit him to represent himself at his retrial deprived him of his constitutional right of self-representation. U. S. Const., Amdt. 6; *Faretta*, *supra*. The court agreed and ordered a new trial. The matter then went to the Indiana Supreme Court. That court found that "[t]he record in this case presents a substantial basis to agree with the trial court," 866 N. E. 2d 252, 260 (2007), but it nonetheless affirmed the intermediate appellate court on the belief that this Court's precedents, namely, *Faretta*, *supra*, and *Godinez* v. *Moran*, 509 U. S. 389 (1993), required the State to allow Edwards to represent himself. At Indiana's request, we agreed to consider whether the Constitution required the trial court to allow Edwards to represent himself at trial.

II

Our examination of this Court's precedents convinces us that those precedents frame the question presented, but they do not answer it. The two cases that set forth the Con-

stitution's "mental competence" standard, *Dusky* v. *United States*, 362 U. S. 402 (1960) *(per curiam)*, and *Drope* v. *Missouri*, 420 U. S. 162 (1975), specify that the Constitution does not permit trial of an individual who lacks "mental competency." *Dusky* defines the competency standard as including both (1) "whether" the defendant has "a rational as well as factual understanding of the proceedings against him" and (2) whether the defendant "has sufficient present ability *to consult with his lawyer* with a reasonable degree of rational understanding." 362 U. S., at 402 (emphasis added; internal quotation marks omitted). *Drope* repeats that standard, stating that it "has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, *to consult with counsel, and to assist in preparing his defense* may not be subjected to a trial." 420 U. S., at 171 (emphasis added). Neither case considered the mental competency issue presented here, namely, the relation of the mental competence standard to the right of self-representation.

The Court's foundational "self-representation" case, *Faretta*, held that the Sixth and Fourteenth Amendments include a "constitutional right to proceed *without* counsel when" a criminal defendant "voluntarily and intelligently elects to do so." 422 U. S., at 807 (emphasis in original). The Court implied that right from: (1) a "nearly universal conviction," made manifest in state law, that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so," *id.*, at 817–818; (2) Sixth Amendment language granting rights to the "accused"; (3) Sixth Amendment structure indicating that the rights it sets forth, related to the "fair administration of American justice," are "persona[l]" to the accused, *id.*, at 818–821; (4) the absence of historical examples of *forced* representation, *id.*, at 821–832; and (5) " 'respect for the individual,' " *id.*, at 834 (quoting *Illinois* v. *Allen*, 397 U. S. 337,

350–351 (1970) (Brennan, J., concurring) (a knowing and intelligent waiver of counsel "must be honored out of 'that respect for the individual which is the lifeblood of the law' ")).

Faretta does not answer the question before us both because it did not consider the problem of mental competency (cf. 422 U. S., at 835 (Faretta was "literate, competent, and understanding")), and because *Faretta* itself and later cases have made clear that the right of self-representation is not absolute, see *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 163 (2000) (no right of self-representation on direct appeal in a criminal case); *McKaskle* v. *Wiggins*, 465 U. S. 168, 178–179 (1984) (appointment of standby counsel over self-represented defendant's objection is permissible); *Faretta*, 422 U. S., at 835, n. 46 (no right "to abuse the dignity of the courtroom"); *ibid.* (no right to avoid compliance with "relevant rules of procedural and substantive law"); *id.*, at 834, n. 46 (no right to "engag[e] in serious and obstructionist misconduct," referring to *Illinois* v. *Allen*, *supra*). The question here concerns a mental-illness-related limitation on the scope of the self-representation right.

The sole case in which this Court considered mental competence and self-representation together, *Godinez*, *supra*, presents a question closer to that at issue here. The case focused upon a borderline-competent criminal defendant who had asked a state trial court to permit him to represent himself and to change his pleas from not guilty to guilty. The state trial court had found that the defendant met *Dusky*'s mental competence standard, that he "knowingly and intelligently" waived his right to assistance of counsel, and that he "freely and voluntarily" chose to plead guilty. 509 U. S., at 393 (internal quotation marks omitted). And the state trial court had consequently granted the defendant's self-representation and change-of-plea requests. See *id.*, at 392–393. A federal appeals court, however, had vacated the defendant's guilty pleas on the ground that the Constitution

required the trial court to ask a further question, namely, whether the defendant was competent to waive his constitutional right to counsel. See *id.*, at 393–394. Competence to make that latter decision, the appeals court said, required the defendant to satisfy a higher mental competency standard than the standard set forth in *Dusky*. See 509 U. S., at 393–394. *Dusky*'s more general standard sought only to determine whether a defendant represented by counsel was competent to stand trial, not whether he was competent to waive his right to counsel. 509 U. S., at 394–395.

This Court, reversing the Court of Appeals, "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard." *Id.*, at 398. The decision to plead guilty, we said, "is no more complicated than the sum total of decisions that a [represented] defendant may be called upon to make during the course of a trial." *Ibid.* Hence "there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights." *Id.*, at 399. And even assuming that self-representation might pose special trial-related difficulties, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Ibid.* (emphasis in original). For this reason, we concluded, "the defendant's 'technical legal knowledge' is 'not relevant' to the determination." *Id.*, at 400 (quoting *Faretta*, *supra*, at 836).

We concede that *Godinez* bears certain similarities with the present case. Both involve mental competence and self-representation. Both involve a defendant who wants to represent himself. Both involve a mental condition that falls in a gray area between *Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose.

We nonetheless conclude that *Godinez* does not answer the question before us now. In part that is because the Court of Appeals' higher standard at issue in *Godinez* differs in a critical way from the higher standard at issue here. In *Godinez*, the higher standard sought to measure the defendant's ability to proceed on his own to enter a guilty plea; here the higher standard seeks to measure the defendant's ability to conduct trial proceedings. To put the matter more specifically, the *Godinez* defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue. Thus we emphasized in *Godinez* that we needed to consider only the defendant's "competence to *waive the right*." 509 U. S., at 399 (emphasis in original). And we further emphasized that we need *not* consider the defendant's "technical legal knowledge" about how to proceed at trial. *Id.*, at 400 (internal quotation marks omitted). We found our holding consistent with this Court's earlier statement in *Massey* v. *Moore*, 348 U. S. 105, 108 (1954), that "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." See *Godinez*, *supra*, at 399–400, n. 10 (quoting *Massey* and noting that it dealt with "a question that is quite different from the question presented" in *Godinez*). In this case, the very matters that we did not consider in *Godinez* are directly before us.

For another thing, *Godinez* involved a State that sought to *permit* a gray-area defendant to represent himself. *Godinez*'s constitutional holding is that a State may do so. But that holding simply does not tell a State whether it may *deny* a gray-area defendant the right to represent himself—the matter at issue here. One might argue that *Godinez*'s grant (to a State) of permission to allow a gray-area defendant self-representation must implicitly include permission to deny self-representation. Cf. 509 U. S., at 402 ("States are free to adopt competency standards that are more elaborate

than the *Dusky* formulation"). Yet one could more forcefully argue that *Godinez* simply did not consider whether the Constitution *requires* self-representation by gray-area defendants even in circumstances where the State seeks to disallow it (the question here). The upshot is that, in our view, the question before us is an open one.

III

We now turn to the question presented. We assume that a criminal defendant has sufficient mental competence to stand trial (*i. e.*, the defendant meets *Dusky*'s standard) and that the defendant insists on representing himself during that trial. We ask whether the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented.

Several considerations taken together lead us to conclude that the answer to this question is yes. First, the Court's precedent, while not answering the question, points slightly in the direction of our affirmative answer. *Godinez*, as we have just said, simply leaves the question open. But the Court's "mental competency" cases set forth a standard that focuses directly upon a defendant's "present ability to consult with his lawyer," *Dusky*, 362 U. S., at 402 (internal quotation marks omitted); a "capacity . . . to consult with counsel," and an ability "to assist [counsel] in preparing his defense," *Drope*, 420 U. S., at 171. See *ibid.* ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, *to consult with counsel*, and to assist in preparing his defense may not be subjected to a trial" (emphasis added)). These standards assume representation by counsel and emphasize the importance of counsel. They thus suggest (though do not hold) that an instance in which a defendant who would choose to forgo counsel at trial pre-

sents a very different set of circumstances, which in our view, calls for a different standard.

At the same time *Faretta*, the foundational self-representation case, rested its conclusion in part upon pre-existing state law set forth in cases all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right. See 422 U. S., at 813, and n. 9 (citing 16 state-court decisions and two secondary sources). See, *e. g.*, *Cappetta* v. *State*, 204 So. 2d 913, 917–918 (Fla. App. 1967), rev'd on other grounds, 216 So. 2d 749 (Fla. 1968), cited in *Faretta*, *supra*, at 813, n. 9 (assuring a "mentally competent" defendant the right "to conduct his own defense" *provided that* "no unusual circumstances exist" such as, *e. g.*, "mental derangement" that "would . . . depriv[e]" the defendant "of a fair trial if allowed to conduct his own defense," 204 So. 2d, at 917–918); *id.*, at 918 (noting that "whether unusual circumstances are evident is a matter resting in the sound discretion granted to the trial judge"); *Allen* v. *Commonwealth*, 324 Mass. 558, 562–563, 87 N. E. 2d 192, 195 (1949) (noting "the assignment of counsel" was "necessary" where there was some "special circumstance" such as when the criminal defendant was "mentally defective").

Second, the nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself. Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways. The history of this case (set forth in Part I, *supra*) illustrates the complexity of the problem. In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic

tasks needed to present his own defense without the help of counsel. See, *e. g.*, N. Poythress, R. Bonnie, J. Monahan, R. Otto, & S. Hoge, Adjudicative Competence: The MacArthur Studies 103 (2002) ("Within each domain of adjudicative competence (competence to assist counsel; decisional competence) the data indicate that understanding, reasoning, and appreciation [of the charges against a defendant] are separable and somewhat independent aspects of functional legal ability"). See also *McKaskle*, 465 U. S., at 174 (describing trial tasks as including organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury).

The American Psychiatric Association (APA) tells us (without dispute) in its *amicus* brief filed in support of neither party that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." Brief for APA et al. as *Amici Curiae* 26. Motions and other documents that the defendant prepared in this case (one of which we include in the Appendix, *infra*) suggest to a layperson the common sense of this general conclusion.

Third, in our view, a right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. *McKaskle*, *supra*, at 176–177 ("Dignity" and "autonomy" of individual underlie self-representation right). To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objec-

tives, providing a fair trial. As Justice Brennan put it, "[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes." *Allen*, 397 U. S., at 350 (concurring opinion). See *Martinez*, 528 U. S., at 162 ("Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer"). See also *Sell* v. *United States*, 539 U. S. 166, 180 (2003) ("[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one").

Further, proceedings must not only be fair, they must "appear fair to all who observe them." *Wheat* v. *United States*, 486 U. S. 153, 160 (1988). An *amicus* brief reports one psychiatrist's reaction to having observed a patient (a patient who had satisfied *Dusky*) try to conduct his own defense: "[H]ow in the world can our legal system allow an insane man to defend himself?" Brief for State of Ohio et al. as *Amici Curiae* 24 (internal quotation marks omitted). See *Massey*, 348 U. S., at 108 ("No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court"). The application of *Dusky*'s basic mental competence standard can help in part to avoid this result. But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient. At the same time, the trial judge, particularly one such as the trial judge in this case, who presided over one of Edwards' competency hearings and his two trials, will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.

We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to

do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

IV

Indiana has also asked us to adopt, as a measure of a defendant's ability to conduct a trial, a more specific standard that would "deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury." Brief for Petitioner 20 (emphasis deleted). We are sufficiently uncertain, however, as to how that particular standard would work in practice to refrain from endorsing it as a federal constitutional standard here. We need not now, and we do not, adopt it.

Indiana has also asked us to overrule *Faretta*. We decline to do so. We recognize that judges have sometimes expressed concern that *Faretta*, contrary to its intent, has led to trials that are unfair. See *Martinez*, *supra*, at 164 (BREYER, J., concurring) (noting practical concerns of trial judges). But recent empirical research suggests that such instances are not common. See, *e. g.*, Hashimoto, Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant, 85 N. C. L. Rev. 423, 427, 447, 428 (2007) (noting that of the small number of defendants who chose to proceed *pro se*—"roughly 0.3% to 0.5%" of the total, state felony defendants in particular "appear to have achieved higher felony acquittal rates than their represented counterparts in that they were less likely to have been convicted of felonies"). At the same time, instances in which the trial's fairness is in doubt may well be concentrated in the 20 percent or so of self-representation cases where the mental competence of the defendant is also at issue. See *id.*, at 428 (about 20 percent of federal *pro se* felony defendants ordered to undergo competency evaluations). If so, to-

day's opinion, assuring trial judges the authority to deal appropriately with cases in the latter category, may well alleviate those fair trial concerns.

For these reasons, the judgment of the Supreme Court of Indiana is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

APPENDIX

Excerpt from respondent's filing entitled "'Defendant's Version of the Instant Offense,'" which he had attached to his presentence investigation report:

> "'The appointed motion of permissive intervention filed therein the court superior on, 6–26–01 caused a stay of action and apon it's expiration or thereafter three years the plan to establish a youth program to and for the coordination of aspects of law enforcement to prevent and reduce crime amoung young people in Indiana became a diplomatic act as under the Safe Streets Act of 1967, "A omnibuc considerate agent: I membered clients within the public and others that at/production of the courts actions showcased causes. The costs of the stay (Trial Rule 60) has a derivative property that is: my knowledged events as not unnexpended to contract the membered clients is the commission of finding a facilitie for this plan or project to become organization of administrative recommendations conditioned by governors.'" 866 N. E. 2d, at 258, n. 4 (alterations omitted).

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Constitution guarantees a defendant who knowingly and voluntarily waives the right to counsel the right to proceed *pro se* at his trial. *Faretta* v. *California*, 422 U. S. 806 (1975). A mentally ill defendant who knowingly and voluntarily elects to proceed *pro se* instead of through counsel

receives a fair trial that comports with the Fourteenth Amendment. *Godinez* v. *Moran*, 509 U. S. 389 (1993). The Court today concludes that a State may nonetheless strip a mentally ill defendant of the right to represent himself when that would be fairer. In my view the Constitution does not permit a State to substitute its own perception of fairness for the defendant's right to make his own case before the jury—a specific right long understood as essential to a fair trial.

I

Ahmad Edwards suffers from schizophrenia, an illness that has manifested itself in different ways over time, depending on how and whether Edwards was treated as well as on other factors that appear harder to identify. In the years between 2000 and 2003—years in which Edwards was apparently not treated with the antipsychotic medications and other drugs that are commonly prescribed for his illness—Edwards was repeatedly declared incompetent to stand trial. Even during this period, however, his mental state seems to have fluctuated. For instance, one psychiatrist in March 2001 described Edwards in a competency report as "free of psychosis, depression, mania, and confusion," "alert, oriented, [and] appropriate," apparently "able to think clearly" and apparently "psychiatrically normal." App. 61a.

Edwards seems to have been treated with antipsychotic medication for the first time in 2004. He was found competent to stand trial the same year. The psychiatrist making the recommendation described Edwards' thought processes as "coherent" and wrote that he "communicate[d] very well," that his speech was "easy to understand," that he displayed "good communications skills, cooperative attitude, average intelligence, and good cognitive functioning," that he could "appraise the roles of the participants in the courtroom proceedings," and that he had the capacity to challenge prosecution witnesses realistically and to testify relevantly. *Id.*, at 232a–235a (report of Dr. Robert Sena).

Over the course of what became two separate criminal trials, Edwards sought to act as his own lawyer. He filed a number of incoherent written pleadings with the judge on which the Court places emphasis, but he also filed several intelligible pleadings, such as a motion to dismiss counsel, a motion to dismiss charges under the Indiana speedy trial provision, and a motion seeking a trial transcript.

Edwards made arguments in the courtroom that were more coherent than his written pleadings. In seeking to represent himself at his first trial, Edwards complained in detail that the attorney representing him had not spent adequate time preparing and was not sharing legal materials for use in his defense. The trial judge concluded that Edwards had knowingly and voluntarily waived his right to counsel and proceeded to quiz Edwards about matters of state law. Edwards correctly answered questions about the meaning of *voir dire* and how it operated, and described the basic framework for admitting videotape evidence to trial, though he was unable to answer other questions, including questions about the topics covered by state evidentiary rules that the judge identified only by number. He persisted in his request to represent himself, but the judge denied the request because Edwards acknowledged he would need a continuance. Represented by counsel, he was convicted of criminal recklessness and theft, but the jury deadlocked on charges of attempted murder and battery.

At his second trial, Edwards again asked the judge to be allowed to proceed *pro se*. He explained that he and his attorney disagreed about which defense to present to the attempted murder charge. Edwards' counsel favored lack of intent to kill; Edwards, self-defense. As the defendant put it: "My objection is me and my attorney actually had discussed a defense, I think prosecution had mentioned that, and we are in disagreement with it. He has a defense and I have a defense that I would like to represent or present to the Judge." *Id.*, at 523a.

The court again rejected Edwards' request to proceed *pro se*, and this time it did not have the justification that Edwards had sought a continuance. The court did not dispute that Edwards knowingly and intelligently waived his right to counsel, but stated it was "going to carve out a third exception" to the right of self-representation, and—without explaining precisely what abilities Edwards lacked—stated Edwards was "competent to stand trial but I'm not going to find he's competent to defend himself." *Id.*, at 527a. Edwards sought—by a request through counsel and by raising an objection in open court—to address the judge on the matter, but the judge refused, stating that the issue had already been decided. Edwards' court-appointed attorney pursued the defense the attorney judged best—lack of intent, not self-defense—and Edwards was convicted of both attempted murder and battery. The Supreme Court of Indiana held that he was entitled to a new trial because he had been denied the right to represent himself. The State of Indiana sought certiorari, which we granted. 552 U. S. 1074 (2007).

II

A

The Constitution guarantees to every criminal defendant the "right to proceed *without* counsel when he voluntarily and intelligently elects to do so." *Faretta*, 422 U. S., at 807. The right reflects "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Id.*, at 817. *Faretta*'s discussion of the history of the right, *id.*, at 821–833, includes the observation that "[i]n the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber," *id.*, at 821. *Faretta* described the right to proceed *pro se* as a premise of the Sixth Amendment,

which confers the tools for a defense on the "accused," and describes the role of the attorney as one of "assistance." The right of self-representation could also be seen as a part of the traditional meaning of the Due Process Clause. See *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 165 (2000) (SCALIA, J., concurring in judgment). Whichever provision provides its source, it means that a State simply may not force a lawyer upon a criminal defendant who wishes to conduct his own defense. *Faretta*, 422 U. S., at 807.

Exercising the right of self-representation requires waiving the right to counsel. A defendant may represent himself only when he "'knowingly and intelligently'" waives the lawyer's assistance that is guaranteed by the Sixth Amendment. *Id.*, at 835. He must "be made aware of the dangers and disadvantages of self-representation," and the record must "establish that 'he knows what he is doing and his choice is made with eyes open.'" *Ibid.* (quoting *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942)). This limitation may be relevant to many mentally ill defendants, but there is no dispute that Edwards was not one of them. Edwards was warned extensively of the risks of proceeding *pro se*. The trial judge found that Edwards had "knowingly and voluntarily" waived his right to counsel at his first trial, App. 512a, and at his second trial the judge denied him the right to represent himself only by "carv[ing] out" a new "exception" to the right beyond the standard of knowing and voluntary waiver, *id.*, at 527a.

When a defendant appreciates the risks of forgoing counsel and chooses to do so voluntarily, the Constitution protects his ability to present his own defense even when that harms his case. In fact waiving counsel "usually" does so. *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984); see also *Faretta*, 422 U. S., at 834. We have nonetheless said that the defendant's "choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Ibid.*

What the Constitution requires is not that a State's case be subject to the most rigorous adversarial testing possible—after all, it permits a defendant to eliminate *all* adversarial testing by pleading guilty. What the Constitution requires is that a defendant be given the right to challenge the State's case against him using the arguments *he* sees fit.

In *Godinez*, 509 U. S. 389, we held that the Due Process Clause posed no barrier to permitting a defendant who suffered from mental illness both to waive his right to counsel and to plead guilty, so long as he was competent to stand trial and knowingly and voluntarily waived trial and the counsel right. *Id.*, at 391, 400. It was "never the rule at common law" that a defendant could be competent to stand trial and yet incompetent to either exercise or give up some of the rights provided for his defense. *Id.*, at 404 (KENNEDY, J., concurring in part and concurring in judgment). We rejected the invitation to craft a higher competency standard for waiving counsel than for standing trial. That proposal, we said, was built on the "flawed premise" that a defendant's "competence to represent himself" was the relevant measure: "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Id.*, at 399. We grounded this on *Faretta*'s candid acknowledgment that the Sixth Amendment protected the defendant's right to conduct a defense to his disadvantage. 509 U. S. at 399–400.

B

The Court is correct that this case presents a variation on *Godinez:* It presents the question not whether another constitutional requirement (in *Godinez*, the proposed higher degree of competence required for a waiver) limits a defendant's constitutional right to elect self-representation, but whether a State's view of fairness (or of other values) permits it to strip the defendant of this right. But that makes the question before us an easier one. While one constitu-

tional requirement must yield to another in case of conflict, nothing permits a State, because of *its* view of what is fair, to deny a constitutional protection. Although "the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial," it "does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 145 (2006). Thus, although the Confrontation Clause aims to produce fairness by ensuring the reliability of testimony, States may not provide for unconfronted testimony to be used at trial so long as it is reliable. *Crawford* v. *Washington*, 541 U. S. 36, 61 (2004). We have rejected an approach to individual liberties that "'abstracts from the right to its purposes, and then eliminates the right.'" *Gonzalez-Lopez*, *supra*, at 145 (quoting *Maryland* v. *Craig*, 497 U. S. 836, 862 (1990) (SCALIA, J., dissenting)).

Until today, the right of self-representation has been accorded the same respect as other constitutional guarantees. The only circumstance in which we have permitted the State to deprive a defendant of this trial right is the one under which we have allowed the State to deny *other* such rights: when it is necessary to enable the trial to proceed in an orderly fashion. That overriding necessity, we have said, justifies forfeiture of even the Sixth Amendment right to be present at trial—if, after being threatened with removal, a defendant "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois* v. *Allen*, 397 U. S. 337, 343 (1970). A *pro se* defendant may not "abuse the dignity of the courtroom," nor may he fail to "comply with relevant rules of procedural and substantive law," and a court may "terminate" the self-representation of a defendant who "deliberately engages in serious and obstructionist misconduct." *Faretta*, *supra*, at 834–835, n. 46. This ground for terminating self-representation is unavailable here, however, because Ed-

wards was not even allowed to begin to represent himself, and because he was respectful and compliant and did not provide a basis to conclude a trial could not have gone forward had he been allowed to press his own claims.

Beyond this circumstance, we have never constrained the ability of a defendant to retain "actual control over the case he chooses to present to the jury"—what we have termed "the core of the *Faretta* right." *Wiggins*, 465 U. S., at 178. Thus, while *Faretta* recognized that the right of self-representation does not bar the court from appointing standby counsel, we explained in *Wiggins* that "[t]he *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial." 465 U. S., at 174. Furthermore, because "multiple voices 'for the defense'" could "confuse the message the defendant wishes to convey," *id.*, at 177, a standby attorney's participation would be barred when it would "destroy the jury's perception that the defendant is representing himself," *id.*, at 178.

As I have explained, I would not adopt an approach to the right of self-representation that we have squarely rejected for other rights—allowing courts to disregard the right when doing so serves the purposes for which the right was intended. But if I were to adopt such an approach, I would remain in dissent, because I believe the Court's assessment of the purposes of the right of self-representation is inaccurate to boot. While there is little doubt that preserving individual "'dignity'" (to which the Court refers), *ante*, at 176, is paramount among those purposes, there is equally little doubt that the loss of "dignity" the right is designed to prevent is *not* the defendant's making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the

dignity of individual choice. *Faretta* explained that the Sixth Amendment's counsel clause should not be invoked to impair " 'the exercise of [the defendant's] free choice' " to dispense with the right, 422 U. S., at 815 (quoting *Adams*, 317 U. S., at 280); for "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice," 422 U. S., at 833–834. Nine years later, when we wrote in *Wiggins* that the self-representation right served the "dignity and autonomy of the accused," 465 U. S., at 177, we explained in no uncertain terms that this meant according every defendant the right to his say in court. In particular, we said that individual dignity and autonomy barred standby counsel from participating in a manner that would "destroy the jury's perception that the defendant is representing himself," and meant that "the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury." *Id.*, at 178. In sum, if the Court is to honor the particular conception of "dignity" that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made.

A further purpose that the Court finds is advanced by denial of the right of self-representation is the purpose of ensuring that trials "appear fair to all who observe them." *Ante*, at 177 (internal quotation marks omitted). To my knowledge we have never denied a defendant a right simply on the ground that it would make his trial appear less "fair" to outside observers, and I would not inaugurate that principle here. But were I to do so, I would not apply it to deny a defendant the right to represent himself when he knowingly and voluntarily waives counsel. When Edwards stood to say that "I have a defense that I would like to represent or present to the Judge," App. 523a, it seems to me the epitome of both actual and apparent unfairness for the judge to say, I have heard "your desire to proceed by yourself and

I've denied your request, so your attorney will speak for you from now on," *id.*, at 530a.

III

It may be that the Court permits a State to deprive mentally ill defendants of a historic component of a fair trial because it is suspicious of the constitutional footing of the right of self-representation itself. The right is not explicitly set forth in the text of the Sixth Amendment, and some Members of this Court have expressed skepticism about *Faretta*'s holding. See *Martinez*, 528 U. S., at 156–158 (questioning relevance of historical evidence underlying *Faretta*'s holding); 528 U. S., at 164 (BREYER, J., concurring) (noting "judges closer to the firing line have sometimes expressed dismay about the practical consequences" of the right of self-representation).

While the Sixth Amendment makes no mention of the right to forgo counsel, it provides the defendant, and not his lawyer, the right to call witnesses in his defense and to confront witnesses against him, and counsel is permitted to assist in "*his* defence" (emphasis added). Our trial system, however, allows the attorney representing a defendant "full authority to manage the conduct of the trial"—an authority without which "[t]he adversary process could not function effectively." *Taylor* v. *Illinois*, 484 U. S. 400, 418 (1988); see also *Florida* v. *Nixon*, 543 U. S. 175, 187 (2004). We have held that "the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial." *Taylor*, *supra*, at 418. Thus, in order for the defendant's right to call his own witnesses, to cross-examine witnesses, and to put on a defense to be anything more than "a tenuous and unacceptable legal fiction," a defendant must have consented to the representation of counsel. *Faretta*, 422 U. S., at 821. Otherwise, "the defense presented is not the de-

fense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Ibid.*

The facts of this case illustrate this point with the utmost clarity. Edwards wished to take a self-defense case to the jury. His counsel preferred a defense that focused on lack of intent. Having been denied the right to conduct his own defense, Edwards was convicted without having had the opportunity to present to the jury the grounds he believed supported his innocence. I do not doubt that he likely would have been convicted anyway. But to hold that a defendant may be deprived of the right to make legal arguments for acquittal simply because a state-selected agent has made different arguments on his behalf is, as Justice Frankfurter wrote in *Adams*, *supra*, at 280, to "imprison a man in his privileges and call it the Constitution." In singling out mentally ill defendants for this treatment, the Court's opinion does not even have the questionable virtue of being politically correct. At a time when all society is trying to mainstream the mentally impaired, the Court permits them to be deprived of a basic constitutional right—for their own good.

Today's holding is extraordinarily vague. The Court does not accept Indiana's position that self-representation can be denied "'where the defendant cannot communicate coherently with the court or a jury,'" *ante*, at 178. It does not even hold that Edwards was properly denied his right to represent himself. It holds only that lack of mental competence can under some circumstances form a basis for denying the right to proceed *pro se*, *ante*, at 167. We will presumably give some meaning to this holding in the future, but the indeterminacy makes a bad holding worse. Once the right of self-representation for the mentally ill is a sometime thing, trial judges will have every incentive to make their lives easier—to avoid the painful necessity of deciphering occasional pleadings of the sort contained in the Appendix to today's opinion—by appointing knowledgeable and literate counsel.

Because I think a defendant who is competent to stand trial, and who is capable of knowing and voluntary waiver of assistance of counsel, has a constitutional right to conduct his own defense, I respectfully dissent.

Syllabus

ROTHGERY *v.* GILLESPIE COUNTY, TEXAS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07–440. Argued March 17, 2008—Decided June 23, 2008

Texas police relied on erroneous information that petitioner Rothgery had a previous felony conviction to arrest him as a felon in possession of a firearm. The officers brought Rothgery before a magistrate, as required by state law, for a so-called "article 15.17 hearing," at which the Fourth Amendment probable-cause determination was made, bail was set, and Rothgery was formally apprised of the accusation against him. After the hearing, the magistrate committed Rothgery to jail, and he was released after posting a surety bond. Rothgery had no money for a lawyer and made several unheeded oral and written requests for appointed counsel. He was subsequently indicted and rearrested, his bail was increased, and he was jailed when he could not post the bail. Subsequently, Rothgery was assigned a lawyer, who assembled the paperwork that prompted the indictment's dismissal.

Rothgery then brought this 42 U. S. C. § 1983 action against respondent County, claiming that if it had provided him a lawyer within a reasonable time after the article 15.17 hearing, he would not have been indicted, rearrested, or jailed. He asserts that the County's unwritten policy of denying appointed counsel to indigent defendants out on bond until an indictment is entered violates his Sixth Amendment right to counsel. The District Court granted the County summary judgment, and the Fifth Circuit affirmed, considering itself bound by Circuit precedent to the effect that the right to counsel did not attach at the article 15.17 hearing because the relevant prosecutors were not aware of, or involved in, Rothgery's arrest or appearance at the hearing, and there was no indication that the officer at Rothgery's appearance had any power to commit the State to prosecute without a prosecutor's knowledge or involvement.

Held: A criminal defendant's initial appearance before a magistrate, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Attachment does not also require that a prosecutor (as distinct from a police

officer) be aware of that initial proceeding or involved in its conduct. Pp. 198–213.

(a) Texas's article 15.17 hearing marks the point of attachment, with the consequent state obligation to appoint counsel within a reasonable time once a request for assistance is made. This Court has twice held that the right to counsel attaches at the initial appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. See *Michigan* v. *Jackson*, 475 U. S. 625, 629, n. 3; *Brewer* v. *Williams*, 430 U. S. 387, 398–399. Rothgery's hearing was an initial appearance: he was taken before a magistrate, informed of the formal accusation against him, and sent to jail until he posted bail. Thus, *Brewer* and *Jackson* control. Pp. 198–203.

(b) In *McNeil* v. *Wisconsin*, 501 U. S. 171, 180–181, the Court reaffirmed that "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused," and observed that "in most States . . . free counsel is made available at that time." That observation remains true today. The overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment. The Court is advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel before, at, or just after initial appearance. To the extent the remaining 7 States have been denying appointed counsel at that time, they are a distinct minority. Pp. 203–205.

(c) Neither the Fifth Circuit nor the County offers an acceptable justification for the minority practice. Pp. 205–212.

(1) The Fifth Circuit found the determining factor to be that no prosecutor was aware of Rothgery's article 15.17 hearing or involved in it. This prosecutorial awareness standard is wrong. Neither *Brewer* nor *Jackson* said a word about the prosecutor's involvement as a relevant fact, much less a controlling one. Those cases left no room for the factual enquiry the Circuit would require, and with good reason: an attachment rule that turned on determining the moment of a prosecutor's first involvement would be "wholly unworkable and impossible to administer," *Escobedo* v. *Illinois*, 378 U. S. 478, 496. The Fifth Circuit derived its rule from the statement, in *Kirby* v. *Illinois*, 406 U. S. 682, 689, that the right to counsel attaches when the government has "committed itself to prosecute." But what counts as such a commitment is an issue of federal law unaffected by allocations of power among state officials under state law, cf. *Moran* v. *Burbine*, 475 U. S. 412, 429, n. 3,

Syllabus

and under the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty, see, *e. g.*, *Kirby*, *supra*, at 689. Pp. 205–208.

(2) The County relies on *United States* v. *Gouveia*, 467 U. S. 180, in arguing that in considering the initial appearance's significance, this Court must ignore prejudice to a defendant's pretrial liberty, it being the concern, not of the right to counsel, but of the speedy-trial right and the Fourth Amendment. But the County's suggestion that Fifth Amendment protections at the early stage obviate attachment of the Sixth Amendment right at initial appearance was refuted by *Jackson*, *supra*, at 629, n. 3. And since the Court is not asked to extend the right to counsel to a point earlier than formal judicial proceedings (as in *Gouveia*), but to defer it to those proceedings in which a prosecutor is involved, *Gouveia* does not speak to the question at issue. Pp. 208–210.

(3) The County's third tack gets it no further. Stipulating that the properly formulated test is whether the State has objectively committed itself to prosecute, the County says that prosecutorial involvement is but one form of evidence of such commitment and that others include (1) the filing of formal charges or the holding of an adversarial preliminary hearing to determine probable cause to file such charges, and (2) a court appearance following arrest on an indictment. Either version runs up against *Brewer* and *Jackson*: an initial appearance following a charge signifies a sufficient commitment to prosecute regardless of a prosecutor's participation, indictment, information, or what the County calls a "formal" complaint. The County's assertions that *Brewer* and *Jackson* are "vague" and thus of limited, if any, precedential value are wrong. Although the Court in those cases saw no need for lengthy disquisitions on the initial appearance's significance, that was because it found the attachment issue an easy one. See, *e. g.*, *Brewer*, *supra*, at 399. Pp. 210–212.

491 F. 3d 293, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined. ROBERTS, C. J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 213. ALITO, J., filed a concurring opinion, in which ROBERTS, C. J., and SCALIA, J., joined, *post*, p. 213. THOMAS, J., filed a dissenting opinion, *post*, p. 218.

Danielle Spinelli argued the cause for petitioner. With her on the briefs were *Seth P. Waxman*, *Craig Goldblatt*, *Andrea Marsh*, and *William Christian*.

Gregory S. Coleman argued the cause for respondent. With him on the brief were *Edward C. Dawson*, *Marc S. Tabolsky*, and *Charles S. Frigerio*.*

JUSTICE SOUTER delivered the opinion of the Court.

This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. See *Brewer* v. *Williams*, 430 U. S. 387, 398–399 (1977); *Michigan* v. *Jackson*, 475 U. S. 625, 629, n. 3 (1986). The question here is whether attachment of the right also requires that a public prosecutor (as distinct from a police

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *William H. Neukom* and *Jeffrey T. Green*; for the Brennan Center for Justice et al. by *Anthony J. Franze* and *Son B. Nguyen*; for the National Association of Criminal Defense Lawyers by *Ian Heath Gershengorn* and *Pamela Harris*; and for Twenty-four Professors of Law by *Christopher J. Wright* and *Timothy J. Simeone*.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *R. Ted Cruz*, Solicitor General, *Kent C. Sullivan*, First Assistant Attorney General, *Thomas M. Liporski*, *Danica L. Milios*, and *Susanna G. Dokupil*, Assistant Solicitors General, and *Eric J. R. Nichols*, Deputy Attorney General, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado, *Mark J. Bennett* of Hawaii, *Tom Miller* of Iowa, *G. Steven Rowe* of Maine, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, and *Robert F. McDonnell* of Virginia; and for the Texas Association of Counties et al. by *Alan Keith Curry*.

officer) be aware of that initial proceeding or involved in its conduct. We hold that it does not.

I

A

Although petitioner Walter Rothgery has never been convicted of a felony,[1] a criminal background check disclosed an erroneous record that he had been, and on July 15, 2002, Texas police officers relied on this record to arrest him as a felon in possession of a firearm. The officers lacked a warrant, and so promptly brought Rothgery before a magistrate, as required by Tex. Code Crim. Proc. Ann., Art. 14.06(a) (Vernon Supp. 2007).[2] Texas law has no formal label for this initial appearance before a magistrate, see 41 G. Dix & R. Dawson, Texas Practice Series: Criminal Practice and Procedure § 15.01 (2d ed. 2001), which is sometimes called the "article 15.17 hearing," see, *e. g.*, *Kirk* v. *State*, 199 S. W. 3d 467, 476–477 (Tex. App. 2006); it combines the Fourth Amendment's required probable-cause determination[3] with the setting of bail, and is the point at which the arrestee is formally apprised of the accusation against him, see Tex. Code Crim. Proc. Ann., Art. 15.17(a) (Vernon Supp. 2007).

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[1] "[F]elony charges . . . had been dismissed after Rothgery completed a diversionary program, and both sides agree that [he] did not have a felony conviction." 491 F. 3d 293, 294 (CA5 2007) (case below).

[2] A separate article of the Texas Code of Criminal Procedure requires prompt presentment in the case of arrests under warrant as well. See Art. 15.17(a) (West Supp. 2007). Whether the arrest is under warrant or warrantless, article 15.17 details the procedures a magistrate must follow upon presentment. See Art. 14.06(a) (in cases of warrantless arrest, "[t]he magistrate shall immediately perform the duties described in Article 15.17 of this Code").

[3] See *Gerstein* v. *Pugh*, 420 U. S. 103, 113–114 (1975) ("[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest[,] . . . [but] the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest").

Rothgery's article 15.17 hearing followed routine. The arresting officer submitted a sworn "Affidavit Of Probable Cause" that described the facts supporting the arrest and "charge[d] that . . . Rothgery . . . commit[ted] the offense of unlawful possession of a firearm by a felon—3rd degree felony [Tex. Penal Code Ann. §46.04]," App. to Pet. for Cert. 33a. After reviewing the affidavit, the magistrate "determined that probable cause existed for the arrest." *Id.*, at 34a. The magistrate informed Rothgery of the accusation, set his bail at $5,000, and committed him to jail, from which he was released after posting a surety bond. The bond, which the Gillespie County deputy sheriff signed, stated that "Rothgery stands charged by complaint duly filed . . . with the offense of a . . . felony, to wit: Unlawful Possession of a Firearm by a Felon." *Id.*, at 39a. The release was conditioned on the defendant's personal appearance in trial court "for any and all subsequent proceedings that may be had relative to the said charge in the course of the criminal action based on said charge." *Ibid.*

Rothgery had no money for a lawyer and made several oral and written requests for appointed counsel,[4] which went unheeded.[5] The following January, he was indicted by a Texas grand jury for unlawful possession of a firearm by a felon, resulting in rearrest the next day, and an order increasing bail to $15,000. When he could not post it, he was put in jail and remained there for three weeks.

On January 23, 2003, six months after the article 15.17 hearing, Rothgery was finally assigned a lawyer, who promptly obtained a bail reduction (so Rothgery could get

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[4] Because respondent Gillespie County obtained summary judgment in the current case, we accept as true that Rothgery made multiple requests.

[5] Rothgery also requested counsel at the article 15.17 hearing itself, but the magistrate informed him that the appointment of counsel would delay setting bail (and hence his release from jail). Given the choice of proceeding without counsel or remaining in custody, Rothgery waived the right to have appointed counsel present at the hearing. See 491 F. 3d, at 295, n. 2.

out of jail), and assembled the paperwork confirming that Rothgery had never been convicted of a felony. Counsel relayed this information to the district attorney, who in turn filed a motion to dismiss the indictment, which was granted.

B

Rothgery then brought this 42 U. S. C. § 1983 action against respondent Gillespie County (County), claiming that if the County had provided a lawyer within a reasonable time after the article 15.17 hearing, he would not have been indicted, rearrested, or jailed for three weeks. The County's failure is said to be owing to its unwritten policy of denying appointed counsel to indigent defendants out on bond until at least the entry of an information or indictment.[6] Rothgery sees this policy as violating his Sixth Amendment right to counsel.[7]

The District Court granted summary judgment to the County, see 413 F. Supp. 2d 806, 807 (WD Tex. 2006), and the Court of Appeals affirmed, see 491 F. 3d 293, 294 (CA5 2007). The Court of Appeals felt itself bound by Circuit precedent, see *id.*, at 296–297 (citing *Lomax* v. *Alabama*, 629 F. 2d 413 (CA5 1980), and *McGee* v. *Estelle*, 625 F. 2d 1206 (CA5 1980)), to the effect that the Sixth Amendment right to counsel did not attach at the article 15.17 hearing, because "the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate on July 16, 2002," and "[t]here is also no indication that the officer who filed the

[6] Rothgery does not challenge the County's written policy for appointment of counsel, but argues that the County was not following that policy in practice. See 413 F. Supp. 2d 806, 809–810 (WD Tex. 2006).

[7] Such a policy, if proven, arguably would also be in violation of Texas state law, which appears to require appointment of counsel for indigent defendants released from custody, at the latest, when the "first court appearance" is made. See Tex. Code Crim. Proc. Ann., Art. 1.051(j) (Vernon Supp. 2007). See also Brief for Texas Association of Counties et al. as *Amici Curiae* 13 (asserting that Rothgery "was statutorily entitled to the appointment of counsel within three days after having requested it").

probable cause affidavit at Rothgery's appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor," 491 F. 3d, at 297.

We granted certiorari, 552 U. S. 1061 (2007), and now vacate and remand.

II

The Sixth Amendment right of the "accused" to assistance of counsel in "all criminal prosecutions"[8] is limited by its terms: "it does not attach until a prosecution is commenced." *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991); see also *Moran* v. *Burbine*, 475 U. S. 412, 430 (1986). We have, for purposes of the right to counsel, pegged commencement to "'the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,'" *United States* v. *Gouveia*, 467 U. S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)). The rule is not "mere formalism," but a recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby*, *supra*, at 689. The issue is whether Texas's article 15.17 hearing marks that point, with the consequent state obligation to appoint counsel within a reasonable time once a request for assistance is made.

A

When the Court of Appeals said no, because no prosecutor was aware of Rothgery's article 15.17 hearing or involved in it, the court effectively focused not on the start of adversar-

[8] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

ial judicial proceedings, but on the activities and knowledge of a particular state official who was presumably otherwise occupied. This was error.

As the Court of Appeals recognized, see 491 F. 3d, at 298, we have twice held that the right to counsel attaches at the initial appearance before a judicial officer, see *Jackson*, 475 U. S., at 629, n. 3; *Brewer*, 430 U. S., at 399. This first time before a court, also known as the "'preliminary arraignment'" or "'arraignment on the complaint,'" see 1 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 1.4(g), p. 135 (3d ed. 2007), is generally the hearing at which "the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings," and "determine[s] the conditions for pretrial release," *ibid.* Texas's article 15.17 hearing is an initial appearance: Rothgery was taken before a magistrate, informed of the formal accusation against him, and sent to jail until he posted bail. See *supra*, at 195–196.[9] *Brewer* and *Jackson* control.

The *Brewer* defendant surrendered to the police after a warrant was out for his arrest on a charge of abduction. He

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[9]The Court of Appeals did not resolve whether the arresting officer's formal accusation would count as a "formal complaint" under Texas state law. See 491 F. 3d, at 298–300 (noting the confusion in the Texas state courts). But it rightly acknowledged (albeit in considering the separate question whether the complaint was a "formal charge") that the constitutional significance of judicial proceedings cannot be allowed to founder on the vagaries of state criminal law, lest the attachment rule be rendered utterly "vague and unpredictable." *Virginia* v. *Moore*, 553 U. S. 164, 175 (2008). See 491 F. 3d, at 300 ("[W]e are reluctant to rely on the formalistic question of whether the affidavit here would be considered a 'complaint' or its functional equivalent under Texas case law and Article 15.04 of the Texas Code of Criminal Procedures—a question to which the answer is itself uncertain. Instead, we must look to the specific circumstances of this case and the nature of the affidavit filed at Rothgery's appearance before the magistrate" (footnote omitted)). What counts is that the complaint filed with the magistrate accused Rothgery of committing a particular crime and prompted the judicial officer to take legal action in response (here, to set the terms of bail and order the defendant locked up).

was then "arraigned before a judge . . . on the outstanding arrest warrant," and at the arraignment, "[t]he judge advised him of his *Miranda* [v. *Arizona*, 384 U. S. 436 (1966),] rights and committed him to jail." *Brewer*, 430 U. S., at 391. After this preliminary arraignment, and before an indictment on the abduction charge had been handed up, police elicited incriminating admissions that ultimately led to an indictment for first-degree murder. Because neither of the defendant's lawyers had been present when the statements were obtained, the Court found it "clear" that the defendant "was deprived of . . . the right to the assistance of counsel." *Id.*, at 397–398. In plain terms, the Court said that "[t]here can be no doubt in the present case that judicial proceedings had been initiated" before the defendant made the incriminating statements. *Id.*, at 399. Although it noted that the State had conceded the issue, the Court nevertheless held that the defendant's right had clearly attached for the reason that "[a] warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a . . . courtroom, and he had been committed by the court to confinement in jail." *Ibid.*[10]

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[10]The dissent says that "*Brewer*'s attachment holding is indisputably no longer good law" because "we have subsequently held that the Sixth Amendment right to counsel is '"offense specific,"'" *post*, at 230 (opinion of THOMAS, J.) (quoting *Texas* v. *Cobb*, 532 U. S. 162, 164 (2001)), *i. e.*, that it does not "exten[d] to crimes that are 'factually related' to those that have actually been charged," *id.*, at 167. It is true that *Brewer* appears to have assumed that attachment of the right with respect to the abduction charge should prompt attachment for the murder charge as well. But the accuracy of the dissent's assertion ends there, for nothing in *Cobb*'s conclusion that the right is offense specific casts doubt on *Brewer*'s separate, emphatic holding that the initial appearance marks the point at which the right attaches. Nor does *Cobb* reflect, as the dissent suggests, see *post*, at 230–231, a more general disapproval of our opinion in *Brewer*. While *Brewer* failed even to acknowledge the issue of offense specificity, it spoke clearly and forcefully about attachment. *Cobb* merely declined to follow *Brewer*'s unmentioned assumption, and thus it lends no support to the dissent's claim that we should ignore what *Brewer* explicitly said.

In *Jackson*, the Court was asked to revisit the question whether the right to counsel attaches at the initial appearance, and we had no more trouble answering it the second time around. *Jackson* was actually two consolidated cases, and although the State conceded that respondent Jackson's arraignment "represented the initiation of formal legal proceedings," 475 U. S., at 629, n. 3, it argued that the same was not true for respondent Bladel. In briefing us, the State explained that "[i]n Michigan, any person charged with a felony, after arrest, must be brought before a Magistrate or District Court Judge without unnecessary delay for his initial arraignment." Brief for Petitioner in *Michigan* v. *Bladel*, O. T. 1985, No. 84–1539, p. 24. The State noted that "[w]hile [Bladel] had been arraigned . . . , there is also a second arraignment in Michigan procedure . . . , at which time defendant has his first opportunity to enter a plea in a court with jurisdiction to render a final decision in a felony case." *Id.*, at 25. The State contended that only the latter proceeding, the "arraignment on the information or indictment," Y. Kamisar, W. LaFave, J. Israel, & N. King, Modern Criminal Procedure 28 (9th ed. 1999) (emphasis deleted), should trigger the Sixth Amendment right.[11] "The defend-

[11] The State continued to press this contention at oral argument. See Tr. of Oral Arg. in *Michigan* v. *Jackson*, O. T. 1985, No. 84–1531 etc., p. 4 ("[T]he Michigan Supreme Court held that if a defendant, while at his initial appearance before a magistrate who has no jurisdiction to accept a final plea in the case, whose only job is ministerial, in other words to advise a defendant of the charge against him, set bond if bond is appropriate, and to advise him of his right to counsel and to get the administrative process going if he's indigent, the Michigan Supreme Court said if the defendant asked for appointed counsel at that stage, the police are forevermore precluded from initiating interrogation of that defendant"); *id.*, at 8 ("First of all, as a practical matter, at least in our courts, the police are rarely present for arraignment, for this type of an arraignment, for an initial appearance, I guess we should use the terminology. . . . The prosecutor is not there for initial appearance. We have people brought through a tunnel. A court officer picks them up. They take them down and the judge goes through this procedure. . . . There is typically nobody from our side, if you will, there to see what's going on").

ant's rights," the State insisted, "are fully protected in the context of custodial interrogation between initial arraignment and preliminary examination by the Fifth Amendment right to counsel" and by the preliminary examination itself.[12] See *Bladel* Brief, *supra*, at 26.

We flatly rejected the distinction between initial arraignment and arraignment on the indictment, the State's argument being "untenable" in light of the "clear language in our decisions about the significance of arraignment." *Jackson*, *supra*, at 629, n. 3. The conclusion was driven by the same considerations the Court had endorsed in *Brewer:* by the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial. And that is just as true when the proceeding comes before the indictment (in the case of the initial arraignment on a formal complaint) as when it comes after it (at an arraignment on an indictment).[13] See *Coleman* v. *Alabama*,

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[12] The preliminary examination is a preindictment stage at which the defendant is allowed to test the prosecution's evidence against him, and to try to dissuade the prosecutor from seeking an indictment. See *Coleman* v. *Alabama*, 399 U. S. 1 (1970). In Texas, the defendant is notified of his right to a preliminary hearing, which in Texas is called an "examining trial," at the article 15.17 hearing. See Tex. Code Crim. Proc. Ann., Art. 15.17(a). The examining trial in Texas is optional only, and the defendant must affirmatively request it. See Reply Brief for Petitioner 25.

[13] The County, in its brief to this Court, suggests that although *Brewer* and *Jackson* spoke of attachment at the initial appearance, the cases might actually have turned on some unmentioned fact. As to *Brewer*, the County speculates that an information might have been filed before the defendant's initial appearance. See Brief for Respondent 34–36. But as Rothgery points out, the initial appearance in *Brewer* was made in municipal court, and a felony information could not have been filed there. See Reply Brief for Petitioner 11. As to *Jackson*, the County suggests that the Court might have viewed Michigan's initial arraignment as a significant proceeding only because the defendant could make a statement at that hearing, and because respondent Bladel did in fact purport to enter

399 U. S. 1, 8 (1970) (plurality opinion) (right to counsel applies at preindictment preliminary hearing at which the "sole purposes . . . are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and, if so, to fix bail if the offense is bailable"); cf. *Owen* v. *State*, 596 So. 2d 985, 989, n. 7 (Fla. 1992) ("The term 'arraign' simply means to be called before a court officer and charged with a crime").

B

Our latest look at the significance of the initial appearance was *McNeil*, 501 U. S. 171, which is no help to the County. In *McNeil*, the State had conceded that the right to counsel attached at the first appearance before a county court commissioner, who set bail and scheduled a preliminary examination. See *id.*, at 173; see also *id.*, at 175 ("It is undisputed, and we accept for purposes of the present case, that at the time petitioner provided the incriminating statements at issue, his Sixth Amendment right had attached . . . "). But we did more than just accept the concession; we went on to reaffirm that "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused," and observed that "in most States, at least with respect to serious offenses, free counsel is made available at that time . . . ." *Id.*, at 180–181.

That was 17 years ago, the same is true today, and the overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment. We are advised without contradiction that not only the Federal Government, including the District of Columbia, but 43

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a plea of not guilty. See Brief for Respondent 36–37. But this attempt to explain *Jackson* as a narrow holding is impossible to square with *Jackson*'s sweeping rejection of the State's claims. It is further undermined by the fact that the magistrate in Bladel's case, like the one in Texas's article 15.17 hearing, had no jurisdiction to accept a plea of guilty to a felony charge. See Reply Brief for Petitioner 11–12.

States take the first step toward appointing counsel "before, at, or just after initial appearance." App. to Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 1a; see *id.*, at 1a–7a (listing jurisdictions);[11] see also

[11] The 43 States are these: (1) Alaska: see Alaska Stat. § 18.85.100 (2006); Alaska Rule Crim. Proc. 5 (Lexis 2006–2007); (2) Arizona: see Ariz. Rules Crim. Proc. 4.2 (West Supp. 2007), 6.1 (West 1998); (3) Arkansas: see Ark. Rule Crim. Proc. 8.2 (2006); *Bradford* v. *State*, 325 Ark. 278, 927 S. W. 2d 329 (1996); (4) California: see Cal. Penal Code §§ 858 (1985), 859 (West Supp. 2008); *In re Johnson*, 62 Cal. 2d 325, 329–330, 398 P. 2d 420, 422–423 (1965); (5) Connecticut: see Conn. Gen. Stat. § 54–1b (2005); Conn. Super. Ct. Crim. Rules §§ 37–1, 37–3, 37–6 (West 2008); *State* v. *Pierre*, 277 Conn. 42, 95–96, 890 A. 2d 474, 507 (2006); (6) Delaware: see Del. Code Ann., Tit. 29, § 4604 (2003); Del. Super. Ct. Crim. Rules 5, 44 (2008); *Deputy* v. *State*, 500 A. 2d 581 (Del. 1985); (7) Florida: see Fla. Rule Crim. Proc. 3.111 (West 2007); (8) Georgia: see Ga. Code Ann. §§ 17–4–26 (2004), 17–12–23 (Supp. 2007); *O'Kelley* v. *State*, 278 Ga. 564, 604 S. E. 2d 509 (2004); (9) Hawaii: see Haw. Rev. Stat. §§ 802–1, 803–9 (1993); (10) Idaho: see Idaho Crim. Rules 5, 44 (Lexis 2007); Idaho Code § 19–852 (Lexis 2004); (11) Illinois: see Ill. Comp. Stat., ch. 725, § 5/109–1 (2006); (12) Indiana: see Ind. Code §§ 35–33–7–5, 35–33–7–6 (West 2004); (13) Iowa: see Iowa Rules Crim. Proc. §§ 2.2, 2.28 (West 2008); (14) Kentucky: see Ky. Rule Crim. Proc. 3.05 (Lexis 2008); (15) Louisiana: see La. Code Crim. Proc. Ann., Art 230.1 (West Supp. 2008); (16) Maine: see Me. Rule Crim. Proc. 5C (West 2007); (17) Maryland: see Md. Ann. Code, Art. 27A, § 4 (Lexis Supp. 2007); Md. Rule 4–214 (Lexis 2008); *McCarter* v. *State*, 363 Md. 705, 770 A. 2d 195 (2001); (18) Massachusetts: see Mass. Rule Crim. Proc. 7 (West 2006); (19) Michigan: see Mich. Rule Crim. Proc. 6.005 (West 2008); (20) Minnesota: see Minn. Rules Crim. Proc. 5.01, 5.02 (2006); (21) Mississippi: see *Jimpson* v. *State*, 532 So. 2d 985 (Miss. 1988); (22) Missouri: see Mo. Rev. Stat. § 600.048 (2000); (23) Montana: see Mont. Code Ann. § 46–8–101 (2007); (24) Nebraska: see Neb. Rev. Stat. § 29–3902 (1995); (25) Nevada: see Nev. Rev. Stat. § 178.397 (2007); (26) New Hampshire: see N. H. Rev. Stat. Ann. § 604–A:3 (2001); (27) New Jersey: see N. J. Rule Crim. Proc. 3:4–2 (West 2008); *State* v. *Tucker*, 137 N. J. 259, 645 A. 2d 111 (1994); (28) New Mexico: see N. M. Stat. Ann. § 31–16–3 (2000); (29) New York: see N. Y. Crim. Proc. Law Ann. § 180.10 (West 2007); (30) North Carolina: see N. C. Gen. Stat. Ann. § 7A–451 (Lexis 2007); (31) North Dakota: see N. D. Rules Crim. Proc. 5, 44 (Lexis 2008–2009); (32) Ohio: see Ohio Rules Crim. Proc. 5, 44 (Lexis 2006); (33) Oregon: see Ore. Rev. Stat. §§ 135.010, 135.040, 135.050 (2007); (34) Pennsylvania: see Pa. Rules Crim. Proc. 122, 519 (West 2008);

Brief for American Bar Association as *Amicus Curiae* 5–8 (describing the ABA's position for the past 40 years that counsel should be appointed "certainly no later than the accused's initial appearance before a judicial officer"). And even in the remaining seven States (Alabama, Colorado, Kansas, Oklahoma, South Carolina, Texas, and Virginia) the practice is not free of ambiguity. See App. to Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 5a–7a (suggesting that the practice in Alabama, Kansas, South Carolina, and Virginia might actually be consistent with the majority approach); see also n. 7, *supra*. In any event, to the extent these States have been denying appointed counsel on the heels of the first appearance, they are a distinct minority.

C

The only question is whether there may be some arguable justification for the minority practice. Neither the Court of Appeals in its opinion, nor the County in its briefing to us, has offered an acceptable one.

1

The Court of Appeals thought *Brewer* and *Jackson* could be distinguished on the ground that "neither case addressed the issue of prosecutorial involvement," and the cases were thus "neutral on the point," 491 F. 3d, at 298. With *Brewer* and *Jackson* distinguished, the court then found itself bound

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(35) Rhode Island: see R. I. Dist. Ct. Rules Crim. Proc. 5, 44 (2007); (36) South Dakota: see S. D. Rule Crim. Proc. §23A–40–6 (2007); (37) Tennessee: see Tenn. Rule Crim. Proc. 44 (2007); (38) Utah: see Utah Code Ann. §77–32–302 (Lexis Supp. 2007); (39) Vermont: see Vt. Stat. Ann., Tit. 13, §5234 (1998); Vt. Rules Crim. Proc. 5, 44 (2003); (40) Washington: see Wash. Super. Ct. Crim. Rule 3.1 (West 2008); (41) West Virginia: see W. Va. Code Ann. §50–4–3 (Lexis 2000); *State* v. *Barrow*, 178 W. Va. 406, 359 S. E. 2d 844 (1987); (42) Wisconsin: see Wis. Stat. §967.06 (2003–2004); (43) Wyoming: see Wyo. Stat. Ann. §7–6–105 (2007); Wyo. Rules Crim. Proc. 5, 44 (2007).

by Circuit precedent that "'an adversary criminal proceeding has not begun in a case where the prosecution officers are unaware of either the charges or the arrest.'" 491 F. 3d, at 297 (quoting *McGee* v. *Estelle*, 625 F. 3d 1206, 1208 (CA5 1980)). Under this standard of prosecutorial awareness, attachment depends not on whether a first appearance has begun adversary judicial proceedings, but on whether the prosecutor had a hand in starting it. That standard is wrong.

Neither *Brewer* nor *Jackson* said a word about the prosecutor's involvement as a relevant fact, much less a controlling one. Those cases left no room for the factual enquiry the Court of Appeals would require, and with good reason: an attachment rule that turned on determining the moment of a prosecutor's first involvement would be "wholly unworkable and impossible to administer," *Escobedo* v. *Illinois*, 378 U. S. 478, 496 (1964) (White, J., dissenting), guaranteed to bog the courts down in prying enquiries into the communication between police (who are routinely present at defendants' first appearances) and the State's attorneys (who are not), see Brief for Petitioner 39–41. And it would have the practical effect of resting attachment on such absurd distinctions as the day of the month an arrest is made, see Brief for Brennan Center of Justice et al. as *Amici Curiae* 10 (explaining that "jails may be required to report their arrestees to county prosecutor offices on particular days" (citing Tex. Code Crim. Proc. Ann., Art. 2.19 (Vernon 2005))); or "the sophistication, or lack thereof, of a jurisdiction's computer intake system," Brief for Brennan Center, *supra*, at 11; see also *id.*, at 10–12 (noting that only "[s]ome Texas counties . . . have computer systems that provide arrest and detention information simultaneously to prosecutors, law enforcement officers, jail personnel, and clerks. Prosecutors in these jurisdictions use the systems to pre-screen cases early in the process before an initial appearance" (citing D. Carmichael, M. Gilbert, & M. Voloudakis, Texas A&M U., Public

Policy Research Inst., Evaluating the Impact of Direct Electronic Filing in Criminal Cases: Closing the Paper Trap 2–3 (2006), online at http://www.courts.state.tx.us/tfid/pdf/FinalReport7-12-06wackn.pdf (as visited June 19, 2008, and available in Clerk of Court's case file))).

It is not that the Court of Appeals believed that any such regime would be desirable, but it thought originally that its rule was implied by this Court's statement that the right attaches when the government has "committed itself to prosecute." *Kirby*, 406 U. S., at 689 (plurality opinion). The Court of Appeals reasoned that because "the decision not to prosecute is the quintessential function of a prosecutor" under Texas law, 491 F. 3d, at 297 (internal quotation marks omitted), the State could not commit itself to prosecution until the prosecutor signaled that it had.

But what counts as a commitment to prosecute is an issue of federal law unaffected by allocations of power among state officials under a State's law, cf. *Moran*, 475 U. S., at 429, n. 3 ("[T]he type of circumstances that would give rise to the right would certainly have a federal definition"), and under the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate the prosecution, see *Jackson*, 475 U. S., at 629, n. 3; *Brewer*, 430 U. S., at 399; *Kirby*, *supra*, at 689 (plurality opinion); see also n. 9, *supra*. From that point on, the defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law" that define his capacity and control his actual ability to defend himself against a formal accusation that he is a criminal. *Kirby*, *supra*, at 689 (plurality opinion). By that point, it is too late to wonder whether he is "accused" within the meaning of the Sixth Amendment, and it makes no practical sense to deny it. See Grano, *Rhode Island* v. *Innis:* A Need to Reconsider the Constitu-

tional Premises Underlying the Law of Confessions, 17 Am. Crim. L. Rev. 1, 31 (1979) ("[I]t would defy common sense to say that a criminal prosecution has not commenced against a defendant who, perhaps incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor, less typically by the police, and approved by a court of law" (internal quotation marks omitted)). All of this is equally true whether the machinery of prosecution was turned on by the local police or the state attorney general. In this case, for example, Rothgery alleges that after the initial appearance, he was "unable to find any employment for wages" because "all of the potential employers he contacted knew or learned of the criminal charge pending against him." Original Complaint in No. 1:04–CV–00456–LY (WD Tex., July 15, 2004), p. 5. One may assume that those potential employers would still have declined to make job offers if advised that the county prosecutor had not filed the complaint.

2

The County resists this logic with the argument that in considering the significance of the initial appearance, we must ignore prejudice to a defendant's pretrial liberty, reasoning that it is the concern, not of the right to counsel, but of the speedy-trial right and the Fourth Amendment. See Brief for Respondent 47–51. And it cites *Gouveia*, 467 U. S. 180, in support of its contention. See Brief for Respondent 49; see also Brief for State of Texas et al. as *Amici Curiae* 8–9. We think the County's reliance on *Gouveia* is misplaced, and its argument mistaken.

The defendants in *Gouveia* were prison inmates, suspected of murder, who had been placed in an administrative detention unit and denied counsel up until an indictment was filed. Although no formal judicial proceedings had taken place prior to the indictment, see 467 U. S., at 185, the defendants

argued that their administrative detention should be treated as an accusation for purposes of the right to counsel because the Government was actively investigating the crimes. We recognized that "because an inmate suspected of a crime is already in prison, the prosecution may have little incentive promptly to bring formal charges against him, and that the resulting preindictment delay may be particularly prejudicial to the inmate," *id.*, at 192, but we noted that statutes of limitation and protections of the Fifth Amendment guarded against delay, and that there was no basis for "depart[ing] from our traditional interpretation of the Sixth Amendment right to counsel in order to provide additional protections for [the inmates]," *ibid.*

Gouveia's holding that the Sixth Amendment right to counsel had not attached has no application here. For one thing, *Gouveia* does not affect the conclusion we reaffirmed two years later in *Jackson*, that bringing a defendant before a court for initial appearance signals a sufficient commitment to prosecute and marks the start of adversary judicial proceedings. (Indeed, *Jackson* refutes the County's argument that Fifth Amendment protections at the early stage obviate attachment of the Sixth Amendment right at initial appearance. See *supra*, at 201–202.) And since we are not asked to extend the right to counsel to a point earlier than formal judicial proceedings (as in *Gouveia*), but to defer it to those proceedings in which a prosecutor is involved, *Gouveia* does not speak to the question before us.

The County also tries to downplay the significance of the initial appearance by saying that an attachment rule unqualified by prosecutorial involvement would lead to the conclusion "that the State has statutorily committed to prosecute *every* suspect arrested by the police," given that "state law requires [an article 15.17 hearing] for every arrestee." Brief for Respondent 24 (emphasis in original). The answer, though, is that the State has done just that, subject to the

option to change its official mind later. The State may rethink its commitment at any point: it may choose not to seek indictment in a felony case, say, or the prosecutor may enter *nolle prosequi* after the case gets to the jury room. But without a change of position, a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives.

3

A third tack on the County's part, slightly different from the one taken by the Fifth Circuit, gets it no further. The County stipulates that "the properly formulated test is not . . . merely whether prosecutors have had any involvement in the case whatsoever, but instead whether the State has objectively committed itself to prosecute." *Id.*, at 31. It then informs us that "[p]rosecutorial involvement is merely one form of evidence of such commitment." *Ibid.* Other sufficient evidentiary indications are variously described: first (expansively) as "the filing of formal charges . . . by information, indictment or formal complaint, or the holding of an adversarial preliminary hearing to determine probable cause to file such charges," *ibid.* (citing *Kirby*, 406 U. S., at 689 (plurality opinion)); then (restrictively) as a court appearance following "arrest . . . on an indictment or information," Brief for Respondent 32. Either version, in any event, runs up against *Brewer* and *Jackson:* an initial appearance following a charge signifies a sufficient commitment to prosecute regardless of a prosecutor's participation, indictment, information, or what the County calls a "formal" complaint.

So the County is reduced to taking aim at those cases. *Brewer* and *Jackson*, we are told, are "vague" and thus of "limited, if any, precedential value." Brief for Respondent 33, 35; see also *id.*, at 32, n. 13 (asserting that *Brewer* and *Jackson* "neither provide nor apply an analytical frame-

work for determining attachment"). And, according to the County, our cases (*Brewer* and *Jackson* aside) actually establish a "general rule that the right to counsel attaches at the point that [what the County calls] formal charges are filed," Brief for Respondent 19, with exceptions allowed only in the case of "a very limited set of specific preindictment situations," *id.*, at 23. The County suggests that the latter category should be limited to those appearances at which the aid of counsel is urgent and "'the dangers to the accused of proceeding without counsel'" are great. *Id.*, at 28 (quoting *Patterson* v. *Illinois*, 487 U. S. 285, 298 (1988)). Texas's article 15.17 hearing should not count as one of those situations, the County says, because it is not of critical significance, since it "allows no presentation of witness testimony and provides no opportunity to expose weaknesses in the government's evidence, create a basis for later impeachment, or even engage in basic discovery." Brief for Respondent 29.

We think the County is wrong both about the clarity of our cases and the substance that we find clear. Certainly it is true that the Court in *Brewer* and *Jackson* saw no need for lengthy disquisitions on the significance of the initial appearance, but that was because it found the attachment issue an easy one. The Court's conclusions were not vague; *Brewer* expressed "no doubt" that the right to counsel attached at the initial appearance, 430 U. S., at 399, and *Jackson* said that the opposite result would be "untenable," 475 U. S., at 629, n. 3.

If, indeed, the County had simply taken the cases at face value, it would have avoided the mistake of merging the attachment question (whether formal judicial proceedings have begun) with the distinct "critical stage" question (whether counsel must be present at a postattachment proceeding unless the right to assistance is validly waived). Attachment occurs when the government has used the judicial machinery to signal a commitment to prosecute as spelled out in *Brewer*

and *Jackson*. Once attachment occurs, the accused at least[15] is entitled to the presence of appointed counsel during any "critical stage" of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence.[16] Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.

The County thus makes an analytical mistake in its assumption that attachment necessarily requires the occurrence or imminence of a critical stage. See Brief for Respondent 28–30. On the contrary, it is irrelevant to attachment that the presence of counsel at an article 15.17 hearing, say, may not be critical, just as it is irrelevant that counsel's presence may not be critical when a prosecutor walks over to the trial court to file an information. As we said in *Jackson*, "[t]he question whether arraignment signals the initiation of adversary judicial proceedings . . . is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel." 475 U. S., at 630, n. 3. Texas's article 15.17 hearing plainly signals attachment, even if it is not itself a critical stage.[17]

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[15] We do not here purport to set out the scope of an individual's postattachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis.

[16] The cases have defined critical stages as proceedings between an individual and agents of the State (whether "formal or informal, in court or out," see *United States* v. *Wade*, 388 U. S. 218, 226 (1967)) that amount to "trial-like confrontations," at which counsel would help the accused "in coping with legal problems or . . . meeting his adversary," *United States* v. *Ash*, 413 U. S. 300, 312–313 (1973); see also *Massiah* v. *United States*, 377 U. S. 201 (1964).

[17] The dissent likewise anticipates an issue distinct from attachment when it claims Rothgery has suffered no harm the Sixth Amendment recognizes. *Post*, at 235. Whether the right has been violated and whether Rothgery has suffered cognizable harm are separate questions from when the right attaches, the sole question before us.

III

Our holding is narrow. We do not decide whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this. We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Because the Fifth Circuit came to a different conclusion on this threshold issue, its judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA joins, concurring.

JUSTICE THOMAS's analysis of the present issue is compelling, but I believe the result here is controlled by *Brewer* v. *Williams*, 430 U. S. 387 (1977), and *Michigan* v. *Jackson*, 475 U. S. 625 (1986). A sufficient case has not been made for revisiting those precedents, and accordingly I join the Court's opinion.

I also join JUSTICE ALITO's concurrence, which correctly distinguishes between the time the right to counsel attaches and the circumstances under which counsel must be provided.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring.

I join the Court's opinion because I do not understand it to hold that a defendant is entitled to the assistance of appointed counsel as soon as his Sixth Amendment right attaches. As I interpret our precedents, the term "attach-

ment" signifies nothing more than the beginning of the defendant's prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel. I write separately to elaborate on my understanding of the term "attachment" and its relationship to the Amendment's substantive guarantee of "the Assistance of Counsel for [the] defence."

The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Amendment thus defines the scope of the right to counsel in three ways: It provides *who* may assert the right ("the accused"); *when* the right may be asserted ("[i]n all criminal prosecutions"); and *what* the right guarantees ("the right . . . to have the Assistance of Counsel for his defence").

It is in the context of interpreting the Amendment's answer to the second of these questions—when the right may be asserted—that we have spoken of the right "attaching." In *Kirby* v. *Illinois*, 406 U. S. 682, 688 (1972), a plurality of the Court explained that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." A majority of the Court elaborated on that explanation in *Moore* v. *Illinois*, 434 U. S. 220 (1977):

> "In *Kirby* v. *Illinois*, the plurality opinion made clear that the right to counsel announced in *Wade* and *Gilbert* attaches only to corporeal identifications conducted at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. This is so because the initiation of such proceedings marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable. Thus, in *Kirby* the plurality held that the prosecution's evidence of a robbery victim's one-on-one stationhouse identification of an un-

> counseled suspect shortly after the suspect's arrest was admissible because adversary judicial criminal proceedings had not yet been initiated." *Id.*, at 226–227 (some internal quotation marks and citations omitted).

When we wrote in *Kirby* and *Moore* that the Sixth Amendment right had "attached," we evidently meant nothing more than that a "criminal prosecutio[n]" had begun. Our cases have generally used the term in that narrow fashion. See *Texas* v. *Cobb*, 532 U. S. 162, 167 (2001); *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991); *Michigan* v. *Harvey*, 494 U. S. 344, 353 (1990); *Satterwhite* v. *Texas*, 486 U. S. 249, 254–255 (1988); *Michigan* v. *Jackson*, 475 U. S. 625, 629, and n. 3 (1986); *Moran* v. *Burbine*, 475 U. S. 412, 428 (1986); *United States* v. *Gouveia*, 467 U. S. 180, 188 (1984); *Edwards* v. *Arizona*, 451 U. S. 477, 480, n. 7 (1981); *Doggett* v. *United States*, 505 U. S. 647, 663, n. 2 (1992) (THOMAS, J., dissenting); *Patterson* v. *Illinois*, 487 U. S. 285, 303–304 (1988) (STEVENS, J., dissenting); *United States* v. *Ash*, 413 U. S. 300, 322 (1973) (Stewart, J., concurring in judgment). But see *Estelle* v. *Smith*, 451 U. S. 454, 469 (1981) ("[W]e have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer at or after the time that adversary judicial proceedings have been initiated against him . . . " (internal quotation marks omitted)); *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977) ("[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ").

Because pretrial criminal procedures vary substantially from jurisdiction to jurisdiction, there is room for disagreement about when a "prosecution" begins for Sixth Amendment purposes. As the Court notes, however, we have previously held that "arraignments" that were functionally indistinguishable from the Texas magistration marked the point at which the Sixth Amendment right to counsel

"attached." See *ante*, at 198–199 (discussing *Jackson*, *supra*, and *Brewer*, *supra*).

It does not follow, however, and I do not understand the Court to hold, that the county had an obligation to appoint an attorney to represent petitioner within some specified period after his magistration. To so hold, the Court would need to do more than conclude that petitioner's criminal prosecution had begun. It would also need to conclude that the assistance of counsel in the wake of a Texas magistration is part of the substantive guarantee of the Sixth Amendment. That question lies beyond our reach, petitioner having never sought our review of it. See Pet. for Cert. i (inviting us to decide whether the Fifth Circuit erred in concluding "that adversary judicial proceedings . . . had not commenced, and petitioner's Sixth Amendment rights had not attached"). To recall the framework laid out earlier, we have been asked to address only the *when* question, not the *what* question. Whereas the temporal scope of the right is defined by the words "[i]n all criminal prosecutions," the right's substantive guarantee flows from a different textual font: the words "Assistance of Counsel for his defence."

In interpreting this latter phrase, we have held that "defence" means defense at trial, not defense in relation to other objectives that may be important to the accused. See *Gouveia*, *supra*, at 190 ("[T]he right to counsel exists to protect the accused during trial-type confrontations with the prosecutor . . . "); *Ash*, *supra*, at 309 ("[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial . . . "). We have thus rejected the argument that the Sixth Amendment entitles the criminal defendant to the assistance of appointed counsel at a probable-cause hearing. See *Gerstein* v. *Pugh*, 420 U. S. 103, 122–123 (1975) (observing that the Fourth Amendment hearing "is addressed only to pretrial custody" and has an insubstantial effect on the defendant's trial rights). More generally, we have rejected the notion that the right to counsel entitles the defendant

to a "preindictment private investigator." *Gouveia*, *supra*, at 191.

At the same time, we have recognized that certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial. See, *e. g.*, *Ash*, *supra*, at 309–310; *United States* v. *Wade*, 388 U. S. 218, 226 (1967). Thus, we have held that an indigent defendant is entitled to the assistance of appointed counsel at a preliminary hearing if "substantial prejudice . . . inheres in the . . . confrontation" and "counsel [may] help avoid that prejudice." *Coleman* v. *Alabama*, 399 U. S. 1, 9 (1970) (plurality opinion) (internal quotation marks omitted); see also *White* v. *Maryland*, 373 U. S. 59, 60 (1963) *(per curiam)*. We have also held that the assistance of counsel is guaranteed at a pretrial lineup, since "the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Wade*, *supra*, at 228. Other "critical stages" of the prosecution include pretrial interrogation, a pretrial psychiatric exam, and certain kinds of arraignments. See *Harvey*, *supra*, at 358, n. 4 (STEVENS, J., dissenting); *Estelle*, *supra*, at 470–471; *Coleman*, *supra*, at 7–8 (plurality opinion).

Weaving together these strands of authority, I interpret the Sixth Amendment to require the appointment of counsel only after the defendant's prosecution has begun, and then only as necessary to guarantee the defendant effective assistance at trial. Cf. *McNeil*, *supra*, at 177–178 ("The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to protec[t] the unaided layman at critical confrontations with his expert adversary, the government, *after* the adverse positions of government and defendant have solidified with respect to a particular alleged

crime" (emphasis and alteration in original; internal quotation marks omitted)). It follows that defendants in Texas will not necessarily be entitled to the assistance of counsel within some specified period after their magistrations. See *ante*, at 212 (opinion of the Court) (pointing out the "analytical mistake" of assuming "that attachment necessarily requires the occurrence or imminence of a critical stage"). Texas counties need only appoint counsel as far in advance of trial, and as far in advance of any pretrial "critical stage," as necessary to guarantee effective assistance at trial. Cf. *ibid.* ("[C]ounsel must be appointed within a reasonable time after attachment *to allow for adequate representation at any critical stage before trial, as well as at trial itself*" (emphasis added)).

The Court expresses no opinion on whether Gillespie County satisfied that obligation in this case. Petitioner has asked us to decide only the limited question whether his magistration marked the beginning of his "criminal prosecutio[n]" within the meaning of the Sixth Amendment. Because I agree with the Court's resolution of that limited question, I join its opinion in full.

JUSTICE THOMAS, dissenting.

The Court holds today—for the first time after plenary consideration of the question—that a criminal prosecution begins, and that the Sixth Amendment right to counsel therefore attaches, when an individual who has been placed under arrest makes an initial appearance before a magistrate for a probable-cause determination and the setting of bail. Because the Court's holding is not supported by the original meaning of the Sixth Amendment or any reasonable interpretation of our precedents, I respectfully dissent.

I

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have

the Assistance of Counsel for his defence." The text of the Sixth Amendment thus makes clear that the right to counsel arises only upon initiation of a "criminal prosecutio[n]." For that reason, the Court has repeatedly stressed that the Sixth Amendment right to counsel "does not attach until a prosecution is commenced." *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991); see also *United States* v. *Gouveia*, 467 U. S. 180, 188 (1984) ("[T]he literal language of the Amendment . . . requires the existence of both a 'criminal prosecutio[n]' and an 'accused' "). Echoing this refrain, the Court today reiterates that "[t]he Sixth Amendment right of the 'accused' to assistance of counsel in 'all criminal prosecutions' is limited by its terms." *Ante*, at 198 (footnote omitted).

Given the Court's repeated insistence that the right to counsel is textually limited to "criminal prosecutions," one would expect the Court's jurisprudence in this area to be grounded in an understanding of what those words meant when the Sixth Amendment was adopted. Inexplicably, however, neither today's decision nor any of the other numerous decisions in which the Court has construed the right to counsel has attempted to discern the original meaning of "criminal prosecutio[n]." I think it appropriate to examine what a "criminal prosecutio[n]" would have been understood to entail by those who adopted the Sixth Amendment.

A

There is no better place to begin than with Blackstone, "whose works constituted the preeminent authority on English law for the founding generation." *Alden* v. *Maine*, 527 U. S. 706, 715 (1999). Blackstone devoted more than 100 pages of his Commentaries on the Laws of England to a discussion of the "regular and ordinary method of proceeding in the courts of criminal jurisdiction." 4 W. Blackstone, Commentaries *289 (hereinafter Blackstone).

At the outset of his discussion, Blackstone organized the various stages of a criminal proceeding "under twelve gen-

eral heads, following each other in a progressive order." *Ibid.* The first six relate to pretrial events: "1. Arrest; 2. Commitment and bail; 3. *Prosecution;* 4. Process; 5. Arraignment, and it's incidents; 6. Plea, and issue." *Ibid.* (emphasis added). Thus, the first significant fact is that Blackstone did not describe the entire criminal process as a "prosecution," but rather listed prosecution as the third step in a list of successive stages. For a more complete understanding of what Blackstone meant by "prosecution," however, we must turn to chapter 23, entitled "Of the Several Modes of Prosecution." *Id.*, at *301. There, Blackstone explained that—after arrest and examination by a justice of the peace to determine whether a suspect should be discharged, committed to prison, or admitted to bail, *id.*, at *296—the "next step towards the punishment of offenders is their *prosecution, or the manner of their formal accusation*," *id.*, at *301 (emphasis added).

Blackstone thus provides a definition of "prosecution": the manner of an offender's "formal accusation." The modifier "formal" is significant because it distinguishes "prosecution" from earlier stages of the process involving a different kind of accusation: the allegation of criminal conduct necessary to justify arrest and detention. Blackstone's discussion of arrest, commitment, and bail makes clear that a person could not be arrested and detained without a "charge" or "accusation," *i. e.*, an allegation, supported by probable cause, that the person had committed a crime. See *id.*, at *289–*300. But the accusation justifying arrest and detention was clearly preliminary to the "formal accusation" that Blackstone identified with "prosecution." See *id.*, at *290, *318.

By "formal accusation," Blackstone meant, in most cases, "indictment, the most usual and effectual means of prosecution." *Id.*, at *302. Blackstone defined an "indictment" as "a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury." *Ibid.* (emphasis deleted). If the grand jury

was "satisfied of the truth of the accusation," it endorsed the indictment, *id.*, at *305–*306, which was then "publicly delivered into court," *id.*, at *306, "afterwards to be tried and determined," *id.*, at *303, "before an officer having power to punish the [charged] offence," 2 T. Cunningham, A New and Complete Law Dictionary (2d ed. 1771).

In addition to indictment, Blackstone identified two other "methods of prosecution at the suit of the king." 4 Blackstone *312. The first was presentment, which, like an indictment, was a grand jury's formal accusation "of an offence, inquirable in the Court where it [was] presented." 5 G. Jacob, The Law-Dictionary 278–279 (1811). The principal difference was that the accusation arose from "the notice taken by a grand jury of any offence from their own knowledge or observation" rather than from a "bill of indictment laid before them." 4 Blackstone *301. The second was information, "the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury." *Id.*, at *308. After an information was filed, it was "tried," *id.*, at *309, in the same way as an indictment: "The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment," *id.*, at *310.

From the foregoing, the basic elements of a criminal "prosecution" emerge with reasonable clarity. "Prosecution," as Blackstone used the term, referred to "instituting a criminal suit," *id.*, at *309, by filing a formal charging document—an indictment, presentment, or information—upon which the defendant was to be tried in a court with power to punish the alleged offense. And, significantly, Blackstone's usage appears to have accorded with the ordinary meaning of the term. See 2 N. Webster, An American Dictionary of the English Language (1828) (defining "prosecution" as "[t]he institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an of-

fender before a legal tribunal, and pursuing them to final judgment," and noting that "*[p]rosecutions* may be by presentment, information or indictment").

B

With Blackstone as our guide, it is significant that the Framers used the words "criminal prosecutions" in the Sixth Amendment rather than some other formulation such as "criminal proceedings" or "criminal cases." Indeed, elsewhere in the Bill of Rights we find just such an alternative formulation: In contrast to the Sixth Amendment, the Fifth Amendment refers to "criminal case[s]." U. S. Const., Amdt. 5 ("No person . . . shall be compelled in any criminal case to be a witness against himself").

In *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), the Court indicated that the difference in phraseology was not accidental. There the Court held that the Fifth Amendment right not to be compelled to be a witness against oneself "in any criminal case" could be invoked by a witness testifying before a grand jury. The Court rejected the argument that there could be no "criminal case" prior to indictment, reasoning that a "criminal case" under the Fifth Amendment is much broader than a "criminal prosecution" under the Sixth Amendment. *Id.*, at 563.

The following Term, the Court construed the phrase "criminal prosecution" in a statutory context, and this time the Court squarely held that a "prosecution" does not encompass preindictment stages of the criminal process. In *Virginia* v. *Paul*, 148 U. S. 107 (1893), the Court considered Revised Statute §643, which authorized removal to federal court of any "'criminal prosecution'" "'commenced in any court of a State'" against a federal officer. *Id.*, at 115. The respondent, a deputy marshal, had been arrested by Virginia authorities on a warrant for murder and was held in county jail awaiting his appearance before a justice of the peace "with a view to a commitment to await the action of the

grand jury." *Id.*, at 118. He filed a petition for removal of "'said cause'" to federal court. *Ibid.* The question before the Court was whether a "'criminal prosecution'" had "'commenced'" within the meaning of the statute at the time the respondent filed his removal petition.

The Court held that a criminal prosecution had not commenced, and that removal was therefore not authorized by the terms of the statute. The Court noted that under Virginia law murder could be prosecuted only "by indictment found in the county court," and that "a justice of the peace, upon a previous complaint, [could] do no more than to examine whether there [was] good cause for believing that the accused [was] guilty, and to commit him for trial before the court having jurisdiction of the offence." *Ibid.* Accordingly, where "no indictment was found, or other action taken, in the county court," there was as yet no "'criminal prosecution.'" *Id.*, at 119. The appearance before the justice of the peace did not qualify as a "prosecution":

> "Proceedings before a magistrate to commit a person to jail, or to hold him to bail, in order to secure his appearance to answer for a crime or offence which the magistrate has no jurisdiction himself to try, before the court in which he may be prosecuted and tried, are but preliminary to the prosecution, and are no more a commencement of the prosecution, than is an arrest by an officer without a warrant for a felony committed in his presence." *Ibid.*

C

The foregoing historical summary is strong evidence that the term "criminal prosecutio[n]" in the Sixth Amendment refers to the commencement of a criminal suit by filing formal charges in a court with jurisdiction to try and punish the defendant. And on this understanding of the Sixth Amendment, it is clear that petitioner's initial appearance before the magistrate did not commence a "criminal prosecu-

tio[n]." No formal charges had been filed. The only document submitted to the magistrate was the arresting officer's affidavit of probable cause. The officer stated that he "ha[d] good reason to believe" that petitioner was a felon and had been "walking around [an] RV park with a gun belt on, carrying a pistol, handcuffs, mace spray, extra bullets and a knife." App. to Pet. for Cert. 33a. The officer therefore "charge[d]" that petitioner had "commit[ted] the offense of unlawful possession of a firearm by a felon—3rd degree felony." *Ibid.* The magistrate certified that he had examined the affidavit and "determined that probable cause existed for the arrest of the individual accused therein." *Id.*, at 34a. Later that day, petitioner was released on bail, and did not hear from the State again until he was indicted six months later.

The affidavit of probable cause clearly was not the type of formal accusation Blackstone identified with the commencement of a criminal "prosecution." Rather, it was the preliminary accusation necessary to justify arrest and detention—stages of the criminal process that Blackstone placed before prosecution. The affidavit was not a pleading that instituted a criminal prosecution, such as an indictment, presentment, or information; and the magistrate to whom it was presented had no jurisdiction to try and convict petitioner for the felony offense charged therein. See *Teal* v. *State*, 230 S. W. 3d 172, 174 (Tex. Crim. App. 2007) ("The Texas Constitution requires that, unless waived by the defendant, the State must obtain a grand jury indictment in a felony case"); Tex. Code Crim. Proc. Ann., Arts. 4.05, 4.11(a) (Vernon 2005). That is most assuredly why the magistrate informed petitioner that charges "*will be* filed" in district court. App. to Pet. for Cert. 35a (emphasis added).

The original meaning of the Sixth Amendment, then, cuts decisively against the Court's conclusion that petitioner's right to counsel attached at his initial appearance before the magistrate. But we are not writing on a blank slate: This

Court has a substantial body of more recent precedent construing the Sixth Amendment right to counsel.

II

As the Court notes, our cases have "pegged commencement" of a criminal prosecution, *ante*, at 198, to "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion). The Court has repeated this formulation in virtually every right-to-counsel case decided since *Kirby*. Because *Kirby*'s formulation of the attachment test has been accorded such precedential significance, it is important to determine precisely what *Kirby* said:

> "In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell* v. *Alabama*, 287 U. S. 45 [(1932)], it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell* v. *Alabama*, *supra*; *Johnson* v. *Zerbst*, 304 U. S. 458 [(1938)]; *Hamilton* v. *Alabama*, 368 U. S. 52 [(1961)]; *Gideon* v. *Wainwright*, 372 U. S. 335 [(1963)]; *White* v. *Maryland*, 373 U. S. 59 [(1963) *(per curiam)*]; *Massiah* v. *United States*, 377 U. S. 201 [(1964)]; *United States* v. *Wade*, 388 U. S. 218 [(1967)]; *Gilbert* v. *California*, 388 U. S. 263 [(1967)]; *Coleman* v. *Alabama*, 399 U. S. 1 [(1970)].
>
> "This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. The *Powell* case makes clear that the right attaches at the time of arraignment, and the Court has recently held that it exists also at the time of a preliminary hearing. *Coleman* v. *Alabama*, *supra*. But the point is that, while members of the Court have differed

> as to existence of the right to counsel in the contexts of some of the above cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.*, at 688–689 (footnote omitted).

It is noteworthy that *Kirby* did not purport to announce anything new; rather, it simply catalogued what the Court had previously held. And the point of the plurality's discussion was that the criminal process contains stages *prior to* commencement of a criminal prosecution. The holding of the case was that the right to counsel did not apply at a station house lineup that took place "*before* the defendant had been indicted or otherwise formally charged with any criminal offense." *Id.*, at 684.

Kirby gave five examples of events that initiate "adversary judicial criminal proceedings": formal charge, preliminary hearing, indictment, information, and arraignment. None of these supports the result the Court reaches today. I will apply them *seriatim*. No indictment or information had been filed when petitioner appeared before the magistrate. Nor was there any other formal charge. Although the plurality in *Kirby* did not define "formal charge," there is no reason to believe it would have included an affidavit of probable cause in that category. None of the cases on which it relied stood for that proposition. Indeed, all of them—with the exception of *White* v. *Maryland*, 373 U. S. 59 (1963) *(per curiam)*, and *Coleman* v. *Alabama*, 399 U. S. 1 (1970)—involved postindictment proceedings. See *Powell* v. *Alabama*, 287 U. S. 45, 49 (1932) (postindictment arraignment); *Johnson* v. *Zerbst*, 304 U. S. 458, 460 (1938) (trial); *Hamilton* v. *Alabama*, 368 U. S. 52, 53, n. 3 (1961) (postindictment arraignment); *Gideon* v. *Wainwright*, 372 U. S. 335, 337 (1963) (trial); *Massiah* v. *United States*, 377 U. S. 201 (1964) (postindictment interrogation); *United States* v. *Wade*, 388 U. S. 218,

219–220 (1967) (postindictment lineup); *Gilbert* v. *California*, 388 U. S. 263, 269 (1967) (same).

Nor was petitioner's initial appearance a preliminary hearing. The comparable proceeding in Texas is called an "examining trial." See *ante*, at 202, n. 12. More importantly, petitioner's initial appearance was unlike the preliminary hearings that were held to constitute "critical stages" in *White* and *Coleman*, because it did not involve entry of a plea, cf. *White*, *supra*, at 60, and was nonadversarial, cf. *Coleman*, *supra*, at 9. There was no prosecutor present, there were no witnesses to cross-examine, there was no case to discover, and the result of the proceeding was not to bind petitioner over to the grand jury or the trial court.

Finally, petitioner's initial appearance was not what *Kirby* described as an "arraignment." An arraignment, in its traditional and usual sense, is a postindictment proceeding at which the defendant enters a plea. See, *e. g.*, W. LaFave, J. Israel, & N. King, Criminal Procedure § 1.3(n), pp. 19–20 (4th ed. 2004); 4 Blackstone *322. Although the word "arraignment" is sometimes used to describe an initial appearance before a magistrate, see LaFave, *supra*, § 1.3(j), at 16, that is not what *Kirby* meant when it said that the right to counsel attaches at an "arraignment." Rather, it meant the traditional, postindictment arraignment where the defendant enters a plea. This would be the most reasonable assumption even if there were nothing else to go on, since that is the primary meaning of the word, especially when used unmodified.

But there is no need to assume. *Kirby* purported to describe only what the Court had already held, and none of the cases *Kirby* cited involved an initial appearance. Only two of the cases involved arraignments, and both were postindictment arraignments at which the defendant entered a plea. *Hamilton*, *supra*, at 53, n. 3; *Powell*, 287 U. S., at 49. And the considerations that drove the Court's analysis in those cases are not present here. See *id.*, at 57 (emphasizing

that "from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel"); *Hamilton*, *supra*, at 53–55 (emphasizing that the defendant entered a plea and was required to raise or waive certain defenses). *Kirby*'s inclusion of "arraignment" in the list of adversary judicial proceedings that trigger the right to counsel thus provides no support for the view that the right to counsel attaches at an initial appearance before a magistrate.

III

It is clear that when *Kirby* was decided in 1972 there was no precedent in this Court for the conclusion that a criminal prosecution begins, and the right to counsel therefore attaches, at an initial appearance before a magistrate. The Court concludes, however, that two subsequent decisions—*Brewer* v. *Williams*, 430 U. S. 387 (1977), and *Michigan* v. *Jackson*, 475 U. S. 625 (1986)—stand for that proposition. Those decisions, which relied almost exclusively on *Kirby*, cannot bear the weight the Court puts on them.[1]

In *Brewer*, the defendant challenged his conviction for murdering a 10-year-old girl on the ground that his Sixth Amendment right to counsel had been violated when detectives elicited incriminating statements from him while transporting him from Davenport, Iowa, where he had been arrested on a warrant for abduction and "arraigned before a judge . . . on the outstanding arrest warrant," to Des Moines,

[1] The Court also relies on *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), to support its assertion that the right to counsel attaches upon an initial appearance before a magistrate. *Ante*, at 203. But in *McNeil*, the Court expressed no view whatsoever on the attachment issue. Rather, it noted that the issue was "undisputed," and "accept[ed] for purposes of the present case, that . . . [the defendant's] Sixth Amendment right had attached." 501 U. S., at 175. We do not ordinarily give weight to assumptions made in prior cases about matters that were not in dispute.

where he was to be tried. 430 U. S., at 390–391. The principal issue was whether the defendant had waived his right to have counsel present during police questioning when he voluntarily engaged one of the detectives in a "wide-ranging conversation." *Id.*, at 392. He subsequently agreed to lead the detectives to the girl's body in response to the so-called "'Christian burial speech,'" in which one of the detectives told the defendant that "'the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered.'" *Id.*, at 392–393. Not surprisingly, the parties vigorously disputed the waiver issue, and it sharply divided the Court.

In contrast, the question whether the defendant's right to counsel had attached was neither raised in the courts below nor disputed before this Court. Nonetheless, the Court, after quoting *Kirby*'s formulation of the test, offered its conclusory observations:

> "There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. The State does not contend otherwise." 430 U. S., at 399.

Brewer's cursory treatment of the attachment issue demonstrates precisely why, when "an issue [is] not addressed by the parties," it is "imprudent of us to address it . . . with any pretense of settling it for all time." *Metropolitan Stevedore Co.* v. *Rambo*, 521 U. S. 121, 136 (1997). As an initial matter, the Court's discussion of the facts reveals little about what happened at the proceeding. There is no indication, for example, whether it was adversarial or whether the defendant

was required to enter a plea or raise or waive any defenses—facts that earlier cases such as *Hamilton*, *White*, and *Coleman* had found significant.

Even assuming, however, that the arraignment in *Brewer* was functionally identical to the initial appearance here, *Brewer* offered no reasoning for its conclusion that the right to counsel attached at such a proceeding. One is left with the distinct impression that the Court simply saw the word "arraignment" in *Kirby*'s attachment test and concluded that the right must have attached because the defendant had been "arraigned." There is no indication that *Brewer* considered the difference between an arraignment on a warrant and an arraignment at which the defendant pleads to the indictment.

The Court finds it significant that *Brewer* expressed "'no doubt'" that the right had attached. *Ante*, at 211 (quoting 430 U. S., at 399). There was no need for a "lengthy disquisitio[n]," the Court says, because *Brewer* purportedly "found the attachment issue an easy one." *Ante*, at 211. What the Court neglects to mention is that *Brewer*'s attachment holding is indisputably no longer good law. That is because we have subsequently held that the Sixth Amendment right to counsel is "offense specific," meaning that it attaches only to those offenses for which the defendant has been formally charged, and not to "other offenses 'closely related factually' to the charged offense." *Texas* v. *Cobb*, 532 U. S. 162, 164 (2001). Because the defendant in *Brewer* had been arraigned only on the abduction warrant, there is no doubt that, under *Cobb*, his right to counsel had not yet attached with respect to the murder charges that were subsequently brought. See 532 U. S., at 184 (BREYER, J., dissenting) (noting that under the majority's rule, "[the defendant's] murder conviction should have remained undisturbed"). But the Court in *Cobb* did not consider itself bound by *Brewer*'s implicit holding on the attachment question. See 532 U. S., at

169 ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue"). And here, as in *Cobb*, *Brewer* did not address the fact that the arraignment on the warrant was not the same type of arraignment at which the right to counsel had previously been held to attach, and the parties did not argue the question. *Brewer* is thus entitled to no more precedential weight here than it was in *Cobb*.

Nor does *Jackson* control. In *Jackson*, as in *Brewer*, the attachment issue was secondary. The question presented was "not whether respondents had a right to counsel at their postarraignment, custodial interrogations," 475 U. S., at 629, but "whether respondents validly waived their right to counsel," *id.*, at 630. And, as in *Brewer*, the Court's waiver holding was vigorously disputed. See 475 U. S., at 637–642 (Rehnquist, J., dissenting); see also *Cobb*, *supra*, at 174–177 (KENNEDY, J., concurring) (questioning *Jackson*'s vitality). Unlike in *Brewer*, however, the attachment question was at least contested in *Jackson*—but barely. With respect to respondent Jackson, the State conceded the issue. *Jackson*, *supra*, at 629, n. 3. And with respect to respondent Bladel, the State had conceded the issue below, see *People* v. *Bladel*, 421 Mich. 39, 77, 365 N. W. 2d 56, 74 (1984) (Boyle, J., dissenting), and raised it for the first time before this Court, devoting only three pages of its brief to the question, see Brief for Petitioner in *Michigan* v. *Bladel*, O. T. 1985, No. 84–1539, pp. 24–26.

The Court disposed of the issue in a footnote. See *Jackson*, *supra*, at 629–630, n. 3. As in *Brewer*, the Court did not describe the nature of the proceeding. It stated only that the respondents were "arraigned." 475 U. S., at 627–628. The Court phrased the question presented in terms of "arraignment," *id.*, at 626 ("The question presented by these two cases is whether the same rule applies to a defendant who has been formally charged with a crime and who has

requested appointment of counsel at his arraignment"), and repeated the words "arraignment" or "postarraignment" no fewer than 35 times in the course of its opinion.

There is no way to know from the Court's opinion in *Jackson* whether the arraignment at issue there was the same type of arraignment at which the right to counsel had been held to attach in *Powell* and *Hamilton*. Only upon examination of the parties' briefs does it become clear that the proceeding was in fact an initial appearance. But *Jackson* did not even acknowledge, much less "flatly reject[t] the distinction between initial arraignment and arraignment on the indictment." *Ante*, at 202. Instead, it offered one sentence of analysis—"In view of the clear language in our decisions about the significance of arraignment, the State's argument is untenable"—followed by a string citation to four cases, each of which quoted *Kirby*. 475 U. S., at 629–630, n. 3. For emphasis, the Court italicized the words "or arraignment" in *Kirby*'s attachment test. 475 U. S., at 629, n. 3 (internal quotation marks omitted).

The only rule that can be derived from the face of the opinion in *Jackson* is that if a proceeding is called an "arraignment," the right to counsel attaches.[2] That rule would

[2]The Court asserts that *Jackson*'s "conclusion was driven by the same considerations the Court had endorsed in *Brewer*," namely, that "by the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial." *Ante*, at 202. But *Jackson* said nothing of the sort.

Moreover, even looking behind the opinion, *Jackson* does not support the result the Court reaches today. Respondent Bladel entered a "not guilty" plea at his arraignment, see Brief for Petitioner in *Michigan* v. *Bladel*, O. T. 1985, No. 84–1539, p. 4, and both *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), and *White* v. *Maryland*, 373 U. S. 59 (1963) *(per curiam)*, had already held that a defendant has a right to counsel when he enters a plea. The Court suggests that this fact is irrelevant because the magistrate in Bladel's case "had no jurisdiction to accept a plea of guilty to a felony charge." *Ante*, at 203, n. 13. But that distinction does not appear in either *Hamilton* or *White*. See *Hamilton*, *supra*, at 55 ("Only the

not govern this case because petitioner's initial appearance was not called an "arraignment" (the parties refer to it as a "magistration," Brief for Petitioner 4; Brief for Respondent 5). And that would, in any case, be a silly rule. The Sixth Amendment consequences of a proceeding should turn on the substance of what happens there, not on what the State chooses to call it. But the Court in *Jackson* did not focus on the substantive distinction between an initial arraignment and an arraignment on the indictment. Instead, the Court simply cited *Kirby* and left it at that. In these circumstances, I would recognize *Jackson* for what it was—a cursory treatment of an issue that was not the primary focus of the Court's opinion. Surely *Jackson*'s footnote must yield to our reasoned precedents.

And our reasoned precedents provide no support for the conclusion that the right to counsel attaches at an initial appearance before a magistrate. *Kirby* explained why the right attaches "after the initiation of adversary judicial criminal proceedings":

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It

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presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently"); *White*, *supra*, at 60 ("[P]etitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel"). Thus, the most that *Jackson* can possibly be made to stand for is that the right to counsel attaches at an initial appearance where the defendant enters a plea. And that rule would not govern this case because petitioner did not enter a plea at his initial appearance.

> is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." 406 U. S., at 689–690 (plurality opinion).

None of these defining characteristics of a "criminal prosecution" applies to petitioner's initial appearance before the magistrate. The initial appearance was not an "adversary" proceeding, and petitioner was not "faced with the prosecutorial forces of organized society." Instead, he stood in front of a "'little glass window,'" filled out various forms, and was read his *Miranda* rights. Brief for Respondent 5. The State had not committed itself to prosecute—only a prosecutor may file felony charges in Texas, see Tex. Code Crim. Proc. Ann., Arts. 2.01, 2.02 (Vernon 2005), and there is no evidence that any prosecutor was even aware of petitioner's arrest or appearance. The adverse positions of government and defendant had not yet solidified—the State's prosecutorial officers had not yet decided whether to press charges and, if so, which charges to press. And petitioner was not immersed in the intricacies of substantive and procedural criminal law—shortly after the proceeding he was free on bail, and no further proceedings occurred until six months later when he was indicted.

Moreover, the Court's holding that the right to counsel attaches at an initial appearance is untethered from any interest that we have heretofore associated with the right to counsel. The Court has repeatedly emphasized that "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." *Johnson*, 304 U. S., at 465. The "core purpose" of the right, the Court has said, is to "assure 'Assistance' at trial, when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U. S. 300, 309 (1973). The Court has extended

the right to counsel to pretrial events only when the absence of counsel would derogate from the defendant's right to a fair trial. See, *e. g.*, *Wade*, 388 U. S., at 227.

Neither petitioner nor the Court identifies any way in which petitioner's ability to receive a fair trial was undermined by the absence of counsel during the period between his initial appearance and his indictment. Nothing during that period exposed petitioner to the risk that he would be convicted as the result of ignorance of his rights. Instead, the gravamen of petitioner's complaint is that if counsel had been appointed earlier, he would have been able to stave off indictment by convincing the prosecutor that petitioner was not guilty of the crime alleged. But the Sixth Amendment protects against the risk of erroneous *conviction*, not the risk of unwarranted *prosecution*. See *Gouveia*, 467 U. S., at 191 (rejecting the notion that the "purpose of the right to counsel is to provide a defendant with a preindictment private investigator").

Petitioner argues that the right to counsel is implicated here because restrictions were imposed on his liberty when he was required to post bail. But we have never suggested that the accused's right to the assistance of counsel "for his defence" entails a right to use counsel as a sword to contest pretrial detention. To the contrary, we have flatly rejected that notion, reasoning that a defendant's liberty interests are protected by other constitutional guarantees. See *id.*, at 190 ("While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial right exists primarily to protect an individual's liberty interest," including the interest in reducing the "'impairment of liberty imposed on an accused while released on bail'").

IV

In sum, neither the original meaning of the Sixth Amendment right to counsel nor our precedents interpreting the

scope of that right supports the Court's holding that the right attaches at an initial appearance before a magistrate. Because I would affirm the judgment below, I respectfully dissent.

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GREENLAW *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 07–330. Argued April 15, 2008—Decided June 23, 2008

Petitioner Greenlaw was convicted of seven drug and firearms charges and was sentenced to imprisonment for 442 months. In calculating this sentence, the District Court made an error. Overlooking this Court's controlling decision in *Deal* v. *United States*, 508 U. S. 129, 132–137, interpreting 18 U. S. C. §924(c)(1)(C)(i), and over the Government's objection, the District Court imposed a 10-year sentence on a count that carried a 25-year mandatory minimum term. Greenlaw appealed urging, *inter alia*, that the appropriate sentence for all his convictions was 15 years. The Government neither appealed nor cross-appealed. The Eighth Circuit found no merit in any of Greenlaw's arguments, but went on to consider whether his sentence was too low. The court acknowledged that the Government, while it had objected to the trial court's error at sentencing, had elected not to seek alteration of Greenlaw's sentence on appeal. Nonetheless, relying on the "plain-error rule" stated in Federal Rule of Criminal Procedure 52(b), the Court of Appeals ordered the District Court to enlarge Greenlaw's sentence by 15 years, yielding a total prison term of 622 months.

Held: Absent a Government appeal or cross-appeal, the Eighth Circuit could not, on its own initiative, order an increase in Greenlaw's sentence. Pp. 243–255.

(a) In both civil and criminal cases, in the first instance and on appeal, courts follow the principle of party presentation, *i. e.*, the parties frame the issues for decision and the courts generally serve as neutral arbiters of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. See *Castro* v. *United States*, 540 U. S. 375, 381–383. The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that rule, it takes a cross-appeal to justify a remedy in favor of an appellee. See *McDonough* v. *Dannery*, 3 Dall. 188. This Court has called the rule "inveterate and certain," *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191, and has in no case ordered an exception to it, *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U. S. 473, 480. No exception is warranted here. Congress has specified that when a United States Attorney files a notice of appeal

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with respect to a criminal sentence, "[t]he Government may not further prosecute [the] appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." 18 U. S. C. §3742(b). This provision gives the top representatives of the United States in litigation the prerogative to seek or forgo appellate correction of sentencing errors, however plain they may be. Pp. 243–246.

(b) The Eighth Circuit held that the plain-error rule, Fed. Rule Crim. Proc. 52(b), authorized it to order the sentence enhancement *sua sponte*. Nothing in the text or history of Rule 52(b), or in this Court's decisions, suggests that the plain-error rule was meant to override the cross-appeal requirement. In every case in which correction of a plain error would result in modifying a judgment to the advantage of a party who did not seek this Court's review, the Court has invoked the cross-appeal rule to bar the correction. See, *e. g.*, *Chittenden* v. *Brewster*, 2 Wall. 191; *Strunk* v. *United States*, 412 U. S. 434. Even if it would be proper for an appeals court to initiate plain-error review in some cases, sentencing errors that the Government has refrained from pursuing would not fit the bill. In §3742(b), Congress assigned to leading Department of Justice officers responsibility for determining when Government pursuit of a sentencing appeal is in order. Rule 52(b) does not invite appellate court interference with the assessment of those officers. Pp. 247–248.

(c) *Amicus curiae*, invited by the Court to brief and argue the case in support of the Court of Appeals' judgment, links the argument based on Rule 52(b) to a similar argument based on 28 U. S. C. §2106. For substantially the same reasons that Rule 52(b) does not override the cross-appeal rule, §2106 does not do so either. Pp. 248–249.

(d) *Amicus* also argues that 18 U. S. C. §3742, which governs appellate review of criminal sentences, overrides the cross-appeal rule for sentences "imposed in violation of law," §3742(e). *Amicus*' construction of §3742 is novel and complex, but ultimately unpersuasive. At the time §3742 was enacted, the cross-appeal rule was a solidly grounded rule of appellate practice. Congress had crafted explicit exceptions to the cross-appeal rule in earlier statutes governing sentencing appeals, *i. e.*, the Organized Crime Control Act of 1970 and the Controlled Substances Act of 1970. When Congress repealed those exceptions and enacted §3742, it did not similarly express in the text of §3742 any exception to the cross-appeal rule. This drafting history suggests that Congress was aware of the cross-appeal rule and framed §3742 expecting that the new provision would operate in harmony with it. Pp. 249–252.

(e) In increasing Greenlaw's sentence *sua sponte*, the Eighth Circuit did not advert to the procedural rules setting firm deadlines for launch-

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ing appeals and cross-appeals. See Fed. Rules App. Proc. 3(a)(1), 4(b)(1)(B)(ii), 4(b)(4), 26(b). The strict time limits on notices of appeal and cross-appeal serve, as the cross-appeal rule does, the interests of the parties and the legal system in fair warning and finality. The time limits would be undermined if an appeals court could modify a judgment in favor of a party who filed no notice of appeal. In a criminal prosecution, moreover, the defendant would appeal at his peril, with nothing to alert him that, on his own appeal, his sentence would be increased until the appeals court so decreed. Pp. 252–253.

(f) Nothing in this opinion requires courts to modify their current practice in "sentencing package cases" involving multicount indictments and a successful attack on some but not all of the counts of conviction. The appeals court, in such cases, may vacate the entire sentence on all counts so that the trial court can reconfigure the sentencing plan. On remand, trial courts have imposed a sentence on the remaining counts longer than the sentence originally imposed on those particular counts, but yielding an aggregate sentence no longer than the aggregate sentence initially imposed. This practice is not at odds with the cross-appeal rule, which stops appellate judges from adding years to a defendant's sentence on their own initiative. In any event, this is not a "sentencing package" case. Greenlaw was unsuccessful on all his appellate issues. The Eighth Circuit, therefore, had no occasion to vacate his sentence and no warrant, in the absence of a cross-appeal, to order the addition of 15 years to his sentence. Pp. 253–255.

481 F. 3d 601, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 255. ALITO, J., filed a dissenting opinion, in which STEVENS, J., joined, and in which BREYER, J., joined as to Parts I, II, and III, *post*, p. 256.

Amy Howe argued the cause for petitioner. With her on the briefs were *Kevin K. Russell*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Thomas C. Goldstein*, and *Kassius O. Benson*.

Deanne E. Maynard argued the cause for the United States. With her on the briefs were former *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Jeffrey P. Singdahlsen*.

Jay T. Jorgensen, by invitation of the Court, 552 U. S. 1135, argued the cause and filed a brief as *amicus curiae* in sup-

port of the judgment below. With him on the brief were *Virginia A. Seitz*, *Carter G. Phillips*, *Ileana Maria Ciobanu*, *Elizabeth L. Howe*, and *HL Rogers*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the role of courts in our adversarial system. The specific question presented: May a United States Court of Appeals, acting on its own initiative, order an increase in a defendant's sentence? Petitioner Michael J. Greenlaw was convicted of various offenses relating to drugs and firearms, and was sentenced to imprisonment for 442 months. He appealed urging, *inter alia*, that his sentence was unreasonably long. After rejecting all of Greenlaw's arguments, the Court of Appeals determined, without Government invitation, that the applicable law plainly required a prison sentence 15 years longer than the term the trial court had imposed. Accordingly, the appeals court instructed the trial court to increase Greenlaw's sentence to 622 months. We hold that, absent a Government appeal or cross-appeal, the sentence Greenlaw received should not have been increased. We therefore vacate the Court of Appeals' judgment.

I

Greenlaw was a member of a gang that, for years, controlled the sale of crack cocaine in a southside Minneapolis neighborhood. See *United States* v. *Carter*, 481 F. 3d 601, 604 (CA8 2007) (case below). To protect their drug stash and to prevent rival dealers from moving into their territory, gang members carried and concealed numerous weapons. See *id.*, at 605. For his part in the operation, Greenlaw was charged, in the United States District Court for the District of Minnesota, with eight offenses; after trial, he was found

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Jonathan D. Hacker and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

guilty on seven of the charges. App. to Pet. for Cert. 16a–17a.

Among Greenlaw's convictions were two for violating 18 U. S. C. §924(c)(1)(A), which prohibits carrying a firearm during and in relation to a crime of violence or a drug trafficking crime: His first §924(c) conviction was for carrying a firearm in connection with a crime committed in 1998; his second, for both carrying and discharging a firearm in connection with a crime committed in 1999. App. to Pet. for Cert. 17a. A first conviction for violating §924(c) carries a mandatory minimum term of 5 years, if the firearm is simply carried. §924(c)(1)(A)(i). If the firearm is also discharged, the mandatory minimum increases to 10 years. §924(c)(1)(A)(iii). For "a second or subsequent conviction," however, whether the weapon is only carried or discharged as well, the mandatory minimum jumps to 25 years. §924(c)(1)(C)(i). Any sentence for violating §924(c), moreover, must run consecutively to "any other term of imprisonment," including any other conviction under §924(c). §924(c)(1)(D)(ii).

At sentencing, the District Court made an error. Over the Government's objection, the court held that a §924(c) conviction does not count as "second or subsequent" when it is "charged in the same indictment" as the defendant's first §924(c) conviction. App. 59, 61–62. The error was plain because this Court had held, in *Deal* v. *United States*, 508 U. S. 129 (1993), that when a defendant is charged in the same indictment with more than one offense qualifying for punishment under §924(c), all convictions after the first rank as "second or subsequent," see *id.*, at 132–137.

As determined by the District Court, Greenlaw's sentence included 262 months (without separately counting sentences that ran concurrently) for all his convictions other than the two under §924(c). For the first §924(c) offense, the court imposed a 5-year sentence in accord with §924(c)(1)(A)(i). As to the second §924(c) conviction, the District Court re-

jected the Government's request for the 25-year minimum prescribed in §924(c)(1)(C) for "second or subsequent" offenses; instead, it imposed the 10-year term prescribed in §924(c)(1)(A)(iii) for first-time offenses.[1] The total sentence thus calculated came to 442 months.

Greenlaw appealed to the United States Court of Appeals for the Eighth Circuit, urging, *inter alia*, that the appropriate total sentence for all his crimes was 15 years. See 481 F. 3d, at 607. The Court of Appeals found no merit in any of Greenlaw's arguments. *Id.*, at 606–607. Although the Government did not appeal or cross-appeal, *id.*, at 608, it did note, on brief and at oral argument, the District Court's error: Greenlaw's sentence should have been 15 years longer than the 442 months imposed by the District Court, the Government observed, because his second §924(c) conviction called for a 25-year (not a 10-year) mandatory minimum consecutive sentence.

The Government made the observation that the sentence was 15 years too short only to counter Greenlaw's argument that it was unreasonably long. See App. 84–86; Recording of Oral Arg. in *United States* v. *Carter*, No. 05–3391 (CA8, Sept. 26, 2006), at 16:53–19:04, available at http://www.ca8.uscourts.gov/oralargs/oaFrame.html (as visited June 13, 2008). Having refrained from seeking correction of the District Court's error by pursuing its own appeal, the Government simply urged that Greenlaw's sentence should be affirmed.

The Court of Appeals acknowledged that the Government, while objecting at sentencing to the trial court's erroneous reading of §924(c)(1)(C), had elected to seek no appellate court alteration of Greenlaw's sentence. 481 F. 3d, at 608. Relying on the "plain-error rule" stated in Federal Rule of Criminal Procedure 52(b), however, the appeals court held

[1] The court added 10 years rather than 5 based on the jury's finding that the firearm Greenlaw carried in connection with the second §924(c) offense had been discharged. See App. 44–45, 59–60.

that it had discretion to raise and correct the District Court's error on its own initiative. 481 F. 3d, at 608–609. The Court of Appeals therefore vacated the sentence and instructed the District Court "to impose the [statutorily mandated] consecutive minimum sentence of 25 years." *Id.*, at 611.

Petitioning for rehearing and rehearing en banc, Greenlaw asked the Eighth Circuit to adopt the position advanced by the Seventh Circuit in *United States* v. *Rivera*, 411 F. 3d 864 (2005). App. 95. "By deciding not to take a cross-appeal," the Seventh Circuit stated, "the United States has ensured that [the defendant's] sentence cannot be increased." 411 F. 3d, at 867. The Eighth Circuit denied rehearing without an opinion. App. to Pet. for Cert. 28a. On remand, as instructed by the Court of Appeals, the District Court increased Greenlaw's sentence by 15 years, yielding a total prison term of 622 months. App. 103–104, 109.

Greenlaw petitioned for certiorari noting a division among the Circuits on this question: When a defendant unsuccessfully challenges his sentence as too high, may a court of appeals, on its own initiative, increase the sentence absent a cross-appeal by the Government? In response, the Government "agree[d] with [Greenlaw] that the court of appeals erred in *sua sponte* remanding the case with directions to enhance petitioner's sentence." Brief in Opposition 12. We granted review and invited Jay T. Jorgensen to brief and argue this case, as *amicus curiae*, in support of the Court of Appeals' judgment. 552 U. S. 1087 and 1135 (2008). Mr. Jorgensen accepted the appointment and has well fulfilled his assigned responsibility.

II

In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. To the extent courts

have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. See *Castro* v. *United States*, 540 U. S. 375, 381–383 (2003).[2] But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.*, at 386 (SCALIA, J., concurring in part and concurring in judgment).[3] As cogently explained:

> "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us." *United States* v. *Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) (R. Arnold, J., concurring in denial of reh'g en banc).

The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party. This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an

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[2] Because this case does not present the issue, we take no position on whether correction of an error prejudicial to a nonappealing criminal defendant might be justified as a measure to obviate the need for a collateral attack. See *post*, at 261–262 (ALITO, J., dissenting).

[3] Cf. Kaplan, Civil Procedure—Reflections on the Comparison of Systems, 9 Buffalo L. Rev. 409, 431–432 (1960) (U. S. system "exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge"; "German system puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal").

appellee. See *McDonough* v. *Dannery*, 3 Dall. 188, 198 (1796). We have called the rule "inveterate and certain." *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191 (1937).

Courts of Appeals have disagreed, however, on the proper characterization of the cross-appeal rule: Is it "jurisdictional," and therefore exceptionless, or a "rule of practice," and thus potentially subject to judicially created exceptions? Compare, *e. g.*, *Johnson* v. *Teamsters Local 559*, 102 F. 3d 21, 28–29 (CA1 1996) (cross-appeal rule "is mandatory and jurisdictional"), with, *e. g.*, *American Roll-On Roll-Off Carrier, LLC* v. *P & O Ports Baltimore, Inc.*, 479 F. 3d 288, 295–296 (CA4 2007) ("cross-appeal requirement [is] one of practice, [not] a strict jurisdictional requirement"). Our own opinions contain statements supporting both characterizations. Compare, *e. g.*, *Morley Constr. Co.*, 300 U. S., at 187 (cross-appeal rule defines "[t]he *power* of an appellate court to modify a decree" (emphasis added)), with, *e. g.*, *Langnes* v. *Green*, 282 U. S. 531, 538 (1931) (cross-appeal requirement is "a rule of practice which generally has been followed").

In *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U. S. 473, 480 (1999), we declined to decide "the theoretical status" of the cross-appeal rule. It sufficed to point out that the rule was "firmly entrenched" and served to advance "institutional interests in fair notice and repose." *Ibid.* "Indeed," we noted, "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." *Ibid.* Following the approach taken in *Neztsosie*, we again need not type the rule "jurisdictional" in order to decide this case.

Congress has eased our decision by specifying the instances in which the Government may seek appellate review of a sentence, and then adding this clear instruction: Even when a United States Attorney files a notice of appeal with

respect to a sentence qualifying for review, "[t]he Government may not further prosecute [the] appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." 18 U. S. C. §3742(b). Congress thus entrusted to named high-ranking officials within the Department of Justice responsibility for determining whether the Government, on behalf of the public, should seek a sentence higher than the one imposed. It would severely undermine Congress' instruction were appellate judges to "sally forth" on their own motion, cf. *supra*, at 244, to take up errors adverse to the Government when the designated Department of Justice officials have not authorized an appeal from the sentence the trial court imposed.[1]

This Court has recognized that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U. S. 683, 693 (1974). We need not decide whether comparable authority and discretion are lodged in the Executive Branch with respect to the pursuit of issues on appeal. We need only recognize that Congress, in §3742(b), has accorded to the top representatives of the United States in litigation the prerogative to seek or forgo appellate correction of sentencing errors, however plain they may be. That measure should garner the Judiciary's full respect.

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[1]The dissent reads §3742(b) not as a restraint on *sua sponte* error correction by appellate courts, but simply as apportioning "authority *within* an executive department." *Post*, at 266; see *post*, at 267 ("[P]erhaps Congress wanted to . . . giv[e] high-level officials the authority to nix meritless or marginal [sentencing appeals]."). A statute is hardly needed to establish the authority of the Attorney General and Solicitor General over local U. S. Attorneys on matters relating to the prosecution of criminal cases, including appeals of sentences. It seems unlikely, moreover, that Congress, having lodged discretion in top-ranking Department of Justice officers, meant that discretion to be shared with more than 200 appellate judges.

III

A

In ordering the District Court to add 15 years to Greenlaw's sentence, despite the absence of a cross-appeal by the Government, the Court of Appeals identified Federal Rule of Criminal Procedure 52(b) as the source of its authority. See 481 F. 3d, at 608–609, and n. 5. Rule 52(b) reads: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Nothing in the text or history of Rule 52(b) suggests that the rulemakers, in codifying the plain-error doctrine, meant to override the cross-appeal requirement. See Advisory Committee's Notes on Fed. Rule Crim. Proc. 52, 18 U. S. C. App., p. 1664 (describing Rule 52(b) as "a restatement of existing law").

Nor do our opinions support a plain-error exception to the cross-appeal rule. This Court has indeed noticed, and ordered correction of, plain errors not raised by defendants, but we have done so only to benefit a defendant who had himself petitioned the Court for review on other grounds. See, *e. g.*, *Silber* v. *United States*, 370 U. S. 717 (1962) *(per curiam)*. In no case have we applied plain-error doctrine to the detriment of a petitioning party. Rather, in every case in which correction of a plain error would result in modification of a judgment to the advantage of a party who did not seek this Court's review, we have invoked the cross-appeal rule to bar the correction.

In *Chittenden* v. *Brewster*, 2 Wall. 191 (1865), for example, the appellants asserted that an award entered in their favor was too small. A prior decision of this Court, however, made it plain that they were entitled to no award at all. See *id.*, at 195–196 (citing *Jones* v. *Green*, 1 Wall. 330 (1864)). But because the appellee had not filed a cross-appeal, the Court left the award undisturbed. See 2 Wall., at 196. *Strunk* v. *United States*, 412 U. S. 434 (1973), decided over a

century later, is similarly illustrative. There, the Court of Appeals had determined that the defendant was denied his right to a speedy trial, but held that the proper remedy was reduction of his sentence as compensation for the delay, not dismissal of the charges against him. As petitioner in this Court, the defendant sought review of the remedial order. See *id.*, at 435. The Court suggested that there may have been no speedy trial violation, as "it seem[ed] clear that [the defendant] was responsible for a large part of the . . . delay." *Id.*, at 436. But because the Government had not raised the issue by cross-petition, we considered the case on the premise that the defendant had been deprived of his Sixth Amendment right, *id.*, at 437, and ruled that dismissal of the indictment was the proper remedy, *id.*, at 439–440.

Even if there might be circumstances in which it would be proper for an appellate court to initiate plain-error review, sentencing errors that the Government refrained from pursuing would not fit the bill. Heightening the generally applicable party presentation principle, Congress has provided a dispositive direction regarding sentencing errors that aggrieve the Government. In §3742(b), as earlier explained, see *supra*, at 245–246, Congress designated leading Department of Justice officers as the decisionmakers responsible for determining when Government pursuit of a sentencing appeal is in order. Those high officers, Congress recognized, are best equipped to determine where the Government's interest lies. Rule 52(b) does not invite appellate court interference with their assessment.

B

Amicus supporting the Eighth Circuit's judgment links the argument based on Rule 52(b) to a similar argument based on 28 U. S. C. §2106. See Brief for *Amicus Curiae* by Invitation of the Court 40–43 (hereinafter Jorgensen Brief). Section 2106 states that federal appellate courts "may affirm, modify, vacate, set aside or reverse any judgment . . . law-

fully brought before it for review." For substantially the same reasons that Rule 52(b) does not override the cross-appeal requirement, §2106 does not do so either. Section 2106 is not limited to plain errors, much less to sentencing errors in criminal cases—it applies to all cases, civil and criminal, and to all errors. Were the construction *amicus* offers correct, §2106 would displace the cross-appeal rule cross the board. The authority described in §2106, we have observed, "must be exercised consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by this Court." *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U. S. 394, 402–403, n. 4 (2006). No different conclusion is warranted with respect to the "inveterate and certain" cross-appeal rule. *Morley Constr. Co.*, 300 U. S., at 191.

C

In defending the Court of Appeals' judgment, *amicus* places heavy weight on an argument pinned not to Rule 52(b) or 28 U. S. C. §2106, but to the text of 18 U. S. C. §3742, the Criminal Code provision governing appellate review of criminal sentences. As *amicus* reads §3742, once either party appeals a sentence, the Court of Appeals must remand "any illegal sentence regardless of whether the remand hurts or helps the appealing party." Jorgensen Brief 9. Congress so directed, *amicus* argues, by instructing that, upon review of the record, a court of appeals "*shall determine* whether the sentence . . . was imposed in violation of law," §3742(e) (2000 ed. and Supp. V) (emphasis added), and "*shall remand*" if it so determines, §3742(f)(1) (2000 ed., Supp. V) (emphasis added). See Jorgensen Brief 10–11, and n. 3.

Amicus makes a further text-based observation. He notes that §3742(f)(2)—the provision covering sentences "outside the applicable [G]uideline range"—calls for a remand only where a departure from the Federal Sentencing Guidelines harms the appellant. In contrast, *amicus* emphasizes, §3742(f)(1)—the provision controlling sentences

imposed "in violation of law" and Guidelines application errors—contains no such appellant-linked limitation. The inference *amicus* draws from this distinction is that Congress intended to override the cross-appeal rule for sentences controlled by §3742(f)(1), *i. e.*, those imposed "in violation of law" (or incorrectly applying the Guidelines), but not for Guidelines departure errors, the category covered by §3742(f)(2). See *id.*, at 14–15.

This novel construction of §3742, presented for the first time in the brief *amicus* filed in this Court,[5] is clever and complex, but ultimately unpersuasive. Congress enacted §3742 in 1984. See Sentencing Reform Act, §213(a), 98 Stat. 2011. At that time, the cross-appeal requirement was a solidly grounded rule of appellate practice. See *supra*, at 244–245. The inference properly drawn, we think, is that Congress was aware of the cross-appeal rule, and framed §3742 expecting that the new provision would operate in harmony with the "inveterate and certain" bar to enlarging judgments in favor of an appellee who filed no cross-appeal. Cf. *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

Congress indicated awareness of the cross-appeal rule in an earlier measure, the Organized Crime Control Act of 1970 (OCCA), Pub. L. 91–452, 84 Stat. 922, which provided for review of sentences of "dangerous special offenders." See §1001(a), *id.*, at 948–951. For that Act, Congress crafted an explicit exception to the cross-appeal rule. It ordered that an appeal of a sentence taken by the Government "shall be deemed the taking of [an appeal] by the defendant." *Id.*, at 950. But the "deeming" ran in only one direction: "[A]

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[5] An appellee or respondent may defend the judgment below on a ground not earlier aired. See *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924) ("[T]he appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record . . . .").

sentence may be made more severe," OCCA provided, "only on review . . . taken by the United States." *Id.*, at 950–951.[6] When Congress repealed this provision and, in §3742, broadly provided for appellate review of sentences, it did not similarly express in the new text any exception to the cross-appeal rule. In short, Congress formulated a precise exception to the cross-appeal rule when that was its intention. Notably, the exception Congress legislated did not expose a defendant to a higher sentence in response to his own appeal. Congress spoke plainly in the 1970 legislation, leaving nothing for a court to infer. We therefore see no reason to read the current statute in the inventive manner *amicus* proposes, inferring so much from so little.

Amicus' reading of §3742, moreover, would yield some strange results. We note two, in particular. Under his construction, §3742 would give with one hand what it takes away with the other: Section 3742(b) entrusts to certain Government officials the decision whether to appeal an illegally low sentence, see *supra*, at 245–246; but according to *amicus*, §§3742(e) and (f) would instruct appellate courts to correct an error of that order on their own initiative, thereby trumping the officials' decision. We resist attributing to Congress an intention to render a statute so internally inconsistent. Cf. *Western Air Lines, Inc.* v. *Board of Equalization of S. D.*, 480 U. S. 123, 133 (1987) ("The illogical results of applying [a proffered] interpretation . . . argue strongly against the conclusion that Congress intended th[o]se results . . . ."). Further, the construction proposed by *amicus* would draw a puzzling distinction between incorrect applications of the Sentencing Guidelines, controlled by §3742(f)(1), and erroneous departures from the Guidelines, covered by

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[6]The Controlled Substances Act of 1970, §409(h), 84 Stat. 1268–1269, contained matching instructions applicable to "dangerous special drug offender[s]." The prescriptions in both Acts were replaced by §3742. See Sentencing Reform Act of 1984, §§212(2), 213(a), 219, 98 Stat. 1987, 2011, 2027.

§3742(f)(2). The latter would be subject to the cross-appeal rule, the former would not. We do not see why Congress would want to differentiate Guidelines decisions this way.[7]

D

In increasing Greenlaw's sentence by 15 years on its own initiative, the Eighth Circuit did not advert to the procedural rules setting deadlines for launching appeals and cross-appeals. Unyielding in character, these rules may be seen as auxiliary to the cross-appeal rule and the party presentation principle served by that rule. Federal Rule of Appellate Procedure 3(a)(1) provides that "[a]n appeal permitted by law . . . may be taken *only by filing a notice of appeal* . . . within the [prescribed] time." (Emphasis added.) Complementing Rule 3(a)(1), Rule 4(b)(1)(B)(ii) instructs that, when the Government has the right to cross-appeal in a criminal case, its notice "*must be filed* . . . within 30 days after . . . the filing of a notice of appeal by any defendant." (Emphasis added.) The filing time for a notice of appeal or cross-appeal, Rule 4(b)(4) states, may be extended "for a period not to exceed 30 days." Rule 26(b) bars any extension beyond that time.

The firm deadlines set by the Appellate Rules advance the interests of the parties and the legal system in fair notice and finality. Thus a defendant who appeals but faces no cross-appeal can proceed anticipating that the appellate court will not enlarge his sentence. And if the Government

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[7] In rejecting the interpretation of §§3742(e) and (f) proffered by *amicus*, we take no position on the extent to which the remedial opinion in *United States* v. *Booker*, 543 U. S. 220 (2005), excised those provisions. Compare *Rita* v. *United States*, 551 U. S. 338, 361–362 (2007) (STEVENS, J., concurring) (*Booker* excised only the portions of §3742(e) that required *de novo* review by courts of appeals), with 551 U. S., at 382, 383 (SCALIA, J., concurring in part and concurring in judgment) (*Booker* excised *all* of §§3742(e) and (f)). See also *Kimbrough* v. *United States*, 552 U. S. 85, 116 (2007) (THOMAS, J., dissenting) (the *Booker* remedial opinion, whatever it held, cannot be followed).

files a cross-appeal, the defendant will have fair warning, well in advance of briefing and argument, that pursuit of his appeal exposes him to the risk of a higher sentence. Given early warning, he can tailor his arguments to take account of that risk. Or he can seek the Government's agreement to voluntary dismissal of the competing appeals, see Fed. Rule App. Proc. 42(b), before positions become hardened during the hours invested in preparing the case for appellate court consideration.

The strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal. In a criminal prosecution, moreover, the defendant would appeal at his peril, with nothing to alert him that, on his own appeal, his sentence would be increased until the appeals court so decreed. In this very case, Greenlaw might have made different strategic decisions had he known soon after filing his notice of appeal that he risked a 15-year increase in an already lengthy sentence.

E

We note that nothing we have said in this opinion requires courts to modify their current practice in so-called "sentencing package cases." Those cases typically involve multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction. The appeals court, in such instances, may vacate the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors in 18 U. S. C. §3553(a) (2000 ed. and Supp. V). In remanded cases, the Government relates, trial courts have imposed a sentence on the remaining counts longer than the sentence originally imposed on those particular counts, but yielding an aggregate sentence no longer than the aggregate sentence initially imposed. See Brief for United States 23, n. 11 (citing, *inter alia*, *United States* v.

Pimienta-Redondo, 874 F. 2d 9 (CA1 1989) (en banc)). Thus the defendant ultimately may gain nothing from his limited success on appeal, but he will also lose nothing, as he will serve no more time than the trial court originally ordered.

The practice the Government describes is not at odds with the cross-appeal rule, which stops appellate judges from adding years to a defendant's sentence on their own initiative. It simply ensures that the sentence "'will suit not merely the offense but the individual defendant.'" *Pimienta-Redondo*, 874 F. 2d, at 14 (quoting *Wasman* v. *United States*, 468 U. S. 559, 564 (1984)). And the assessment will be made by the sentencing judge exercising discretion, not by an appellate panel ruling on an issue of law no party tendered to the court.[8]

This is not a "sentencing package" case. Greenlaw was unsuccessful on all his appellate issues. There was no occasion for the Court of Appeals to vacate his sentence and no warrant, in the absence of a cross-appeal, to order the addition of 15 years to his sentence.[9]

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[8] The dissent suggests that our reading of the cross-appeal rule is anomalous because it could bar a court of appeals from correcting an error that would increase a defendant's sentence, but after a "successful" appeal the district court itself could rely on that same error to increase the sentence. See *post*, at 264–265, and n. 2. The cross-appeal rule, we of course agree, does not confine the trial court. But default and forfeiture doctrines do. It would therefore be hard to imagine a case in which a district court, after a court of appeals vacated a criminal sentence, could properly increase the sentence based on an error the appeals court left uncorrected because of the cross-appeal rule. What of cases remanded post-*Booker* on defendants' appeals, the dissent asks? *Post*, at 265, n. 2. In those cases, defendants invited and received precisely the relief they sought, and the Sixth Amendment required. Neither the cross-appeal rule nor default and forfeiture had any role to play.

[9] For all its spirited argument, the dissent recognizes the narrow gap between its core position and the Court's. The cross-appeal rule, rooted in the principle of party presentation, the dissent concedes, should hold sway in the "vast majority of cases." *Post*, at 259. Does this case qualify as the "rare" exception to the "strong rule of practice" the dissent advo-

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For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, concurring in the judgment.

I agree with JUSTICE ALITO that the cross-appeal requirement is simply a rule of practice for appellate courts, rather than a limitation on their power, and I therefore join Parts I–III of his opinion. Moreover, as a general matter, I would leave application of the rule to the courts of appeals, with our power to review their discretion "seldom to be called into action." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 490 (1951). But since this case is now before us, I would consider whether the Court of Appeals here acted properly. Primarily for the reasons stated by the majority in footnote 9 of its opinion, I believe that the court abused its discretion in *sua sponte* increasing petitioner's sentence. Our precedent precludes the creation of an exception to the cross-appeal requirement based solely on the obviousness of the

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cates? See *ibid.* Greenlaw was sentenced to imprisonment for 442 months. The Government might have chosen to insist on 180 months more, but it elected not to do so. Was the error so "grossly prejudicial," *post*, at 262, 264, so harmful to our system of justice, see *post*, at 262, as to warrant *sua sponte* correction? By what standard is the Court of Appeals to make such an assessment? Without venturing to answer these questions, see *post*, at 268, n. 3, the dissent would simply "entrust the decision to initiate error correction to the sound discretion of the courts of appeals," *post*, at 256. The "strong rule" thus may be broken whenever the particular three judges composing the appellate panel see the sentence as a "wron[g] to right." See *supra*, at 244 (internal quotation marks omitted). The better answer, consistent with our jurisprudence, as reinforced by Congress, entrusts "the decision [whether] to initiate error correction" in this matter to top counsel for the United States. See *supra*, at 246.

lower court's error. See, *e. g.*, *Chittenden* v. *Brewster*, 2 Wall. 191, 195–196 (1865). And I cannot see how the interests of justice are significantly disserved by permitting petitioner's release from prison at roughly age 62, after almost 37 years behind bars, as opposed to age 77.

JUSTICE ALITO, with whom JUSTICE STEVENS joins, and with whom JUSTICE BREYER joins as to Parts I, II, and III, dissenting.

I respectfully dissent because I view the cross-appeal requirement as a rule of appellate practice. It is akin to the rule that courts invoke when they decline to consider arguments that the parties have not raised. Both rules rest on premises about the efficient use of judicial resources and the proper role of the tribunal in an adversary system. Both are sound and should generally be followed. But just as the courts have made them, the courts may make exceptions to them, and I do not understand why a reviewing court should enjoy less discretion to correct an error *sua sponte* than it enjoys to raise and address an argument *sua sponte*. Absent congressional direction to the contrary, and subject to our limited oversight as a supervisory court, we should entrust the decision to initiate error correction to the sound discretion of the courts of appeals.

I

Before laying out my view in more detail, I must first address the question whether federal courts have subject-matter jurisdiction to enlarge an appellee's judgment in the absence of a cross-appeal. Because the Court would not recognize any exceptions to the cross-appeal requirement when the defendant appeals his sentence, it does not decide that question. See *ante*, at 245. I must confront it, though I do not regard it as a substantial question. The cross-appeal requirement seems to me a prime example of a "'rule of

practice,' subject to exceptions, not an unqualified limit on the power of appellate courts." *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U. S. 473, 480 (1999). While a court should generally enforce the cross-appeal requirement, a departure from it would not divest the court of jurisdiction.

This Court has never addressed whether an appellate court's jurisdiction to enlarge a judgment in favor of an appellee is contingent on a duly filed cross-appeal. The majority's contention that "[o]ur own opinions contain statements supporting" the "'jurisdictional'" characterization of the requirement, *ante*, at 245, relies on a misreading of that precedent. The Court may have previously characterized the cross-appeal requirement as limiting "'[t]he *power* of an appellate court to modify a decree,'" *ibid.* (quoting *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 187 (1937)), but it does not follow that jurisdiction is conditioned on a properly filed cross-appeal. A court may lack the power to do something for reasons other than want of jurisdiction, and a rule can be inflexible without being jurisdictional. See *Eberhart* v. *United States*, 546 U. S. 12, 19 (2005) *(per curiam)*.

The jurisdiction of the courts of appeals is fixed by Congress. See *Bowles* v. *Russell*, 551 U. S. 205, 212 (2007); *Ankenbrandt* v. *Richards*, 504 U. S. 689, 698 (1992) ("'[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress'" (quoting *Cary* v. *Curtis*, 3 How. 236, 245 (1845))). If Congress wants to withhold from the courts of appeals the power to decide questions that expand the rights of nonappealing parties, it may do so. See U. S. Const., Art. III, § 1 (authorizing Congress to establish the lower courts and, by corollary, to fix their jurisdiction); *Kontrick* v. *Ryan*, 540 U. S. 443, 452 (2004) ("Only Congress may determine a lower federal

court's subject-matter jurisdiction"). The jurisdictional question thus reduces to whether Congress intended to make a cross-appeal a condition precedent to the appellate court's jurisdiction to enlarge a judgment in favor of a nonappealing party.

As always with such questions, the text of the relevant statute provides the best evidence of congressional intent. The relevant statute in this case is 18 U. S. C. §3742 (2000 ed. and Supp. V). Section 3742(a) authorizes a criminal defendant to "file a notice of appeal" to review a sentence that was, among other possibilities, "imposed in violation of law." *E. g.*, §3742(a)(1). Section 3742(b) provides parallel authority for the Government to "file a notice of appeal" to review unlawful sentences. *E. g.*, §3742(b)(1). The statute conditions the Government's authority to further prosecute its appeal on "the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." §3742(b).

Nothing in this language remotely suggests that a court of appeals lacks subject-matter jurisdiction to increase a defendant's sentence in the absence of a cross-appeal by the Government. In fact, the statute does not even mention cross-appeals. It separately authorizes either party to "file a notice of appeal," but it never suggests that the reviewing court's power is limited to correcting errors for the benefit of the appealing party. If anything, it suggests the opposite. Without qualifying the appellate court's power in any way, §3742(e) instructs the court to determine, among other things, whether the sentence was "imposed in violation of law." §3742(e)(1). And while §3742(f)(2) limits the action that a court of appeals can take depending on which party filed the appeal, compare §3742(f)(2)(A) (sentences set aside as "too high" if defendant filed) with §3742(f)(2)(B) (sentences set aside as "too low" if Government filed), no such limitation appears in §3742(f)(1). That paragraph requires

a court of appeals simply to set aside any sentence "imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines."

II

Since a cross-appeal has no effect on the appellate court's subject-matter jurisdiction, the cross-appeal requirement is best characterized as a rule of practice. It is a rule created by the courts to serve interests that are important to the Judiciary. The Court identifies two of these interests: notice to litigants and finality. *Ante*, at 252; see also *Neztsosie*, *supra*, at 480. One might add that the cross-appeal requirement also serves a third interest: the appellate court's interest in being adequately briefed on the issues that it decides. See Fed. Rule App. Proc. 28.1(c) and Advisory Committee's Notes, 28 U. S. C. App., pp. 615–616. Although these are substantial interests in the abstract, I question how well an inflexible cross-appeal requirement serves them.

Notice. With respect to notice, the benefits of an unyielding cross-appeal requirement are insubstantial. When the Government files a notice of cross-appeal, the defendant is alerted to the possibility that his or her sentence may be increased as a result of the appellate decision. But if the cross-appeal rule is, as I would hold, a strong rule of practice that should be followed in all but exceptional instances, the Government's failure to file a notice of cross-appeal would mean in the vast majority of cases that the defendant thereafter ran little risk of an increased sentence. And the rare cases where that possibility arose would generally involve errors so plain that no conceivable response by the defendant could alter the result. It is not unreasonable to consider an appealing party to be on notice as to such serious errors of law in his favor. And while there may be rare cases in which the existence of such a legal error would come as a complete surprise to the defendant or in which argument

from the parties would be of assistance to the court, the solution to such a problem is not to eliminate the courts of appeals' authority to correct egregious errors. Rather, the appropriate response is for the court of appeals to request supplemental briefing or—if it deems that insufficient—simply to refuse to exercise its authority. Cf. *Irizarry* v. *United States*, 553 U. S. 708, 716 (2008). In short, the Court's holding does not increase the substance of the notice that a defendant receives; it merely accelerates that notice by at most a few weeks in a very small number of cases.

The Court contends that "[g]iven early warning, [the defendant] can tailor his arguments to take account of [the risk of a higher sentence] . . . [o]r he can seek the Government's agreement to voluntary dismissal of the competing appeals." *Ante*, at 253 (citing Fed. Rule App. Proc. 42(b)). But the Court does not explain how a notice of cross-appeal, a boilerplate document, helps the defendant "tailor his arguments." Whether the cross-appeal rule is ironclad, as the Court believes, or simply a strong rule of practice, a defendant who wishes to appeal his or her sentence is always free to seek the Government's commitment not to cross-appeal or to terminate a cross-appeal that the Government has already taken. Rule 42(b).

Finality. An inflexible cross-appeal rule also does little to further the interest of the parties and the Judiciary in the finality of decisions. An appellate court's decision to grant a nonappealing party additional relief does not interrupt a long, undisturbed slumber. The error's repose begins no earlier than the deadline for filing a cross-appeal, and it ends as soon as the reviewing court issues its opinion—and often much sooner. Here, for example, the slumber was broken when the Government identified the error in its brief as appellee. See Brief for United States 5.

Orderly Briefing. I do not doubt that adversarial briefing improves the quality of appellate decisionmaking, but it

hardly follows that appellate courts should be denied the authority to correct errors that seriously prejudice nonappealing parties. Under my interpretation of the cross-appeal rule, a court of appeals would not be obligated to address errors that are prejudicial to a nonappealing party; a court of appeals would merely have the authority to do so in appropriate cases. If a court of appeals noticed such an error and concluded that it was appropriate to address the issue, the court could, if it wished, order additional briefing. If, on the other hand, the court concluded that the issue was not adequately addressed by the briefs filed by the parties in the ordinary course and that additional briefing would interfere with the efficient administration of the court's work, the court would not be required to decide the issue. Therefore, I do not see how the courts of appeals' interest in orderly briefing is furthered by denying those courts the discretionary authority to address important issues that they find it appropriate to decide.

Indeed, the inflexible cross-appeal rule that the Court adopts may disserve the interest in judicial efficiency in some cases. For example, correcting an error that prejudiced a nonappealing defendant on direct review might obviate the need for a collateral attack. Cf. *Granberry* v. *Greer*, 481 U. S. 129, 134 (1987) (allowing the Court of Appeals to address the merits of an unexhausted habeas corpus petition if "the interests of comity and federalism will be better served by addressing the merits forthwith [than] by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim"); *Munaf* v. *Geren*, 553 U. S. 674, 691 (2008) (recognizing "occasions . . . when it is appropriate to proceed further and address the merits" of a habeas corpus petition rather than reverse and remand on threshold matters). Because the reviewing court is in the best position to decide whether a departure from the cross-appeal rule would be efficient, rigid enforcement of

that rule is more likely to waste judicial resources than to conserve them.

In sum, the Court exaggerates the interests served by the cross-appeal requirement. At the same time, it overlooks an important interest that the rule disserves: the interest of the Judiciary and the public in correcting grossly prejudicial errors of law that undermine confidence in our legal system. We have repeatedly stressed the importance of that interest, see, *e. g.*, *United States* v. *Olano*, 507 U. S. 725, 736–737 (1993); *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501, 507 (1984); *New York Central R. Co.* v. *Johnson*, 279 U. S. 310, 318 (1929), and it has justified departures from our traditional adversary framework in other contexts. The Court mentions one of those contexts, see *ante*, at 243–244 (*pro se* litigation), but there are others that deserve mention.

The most well known is plain-error review. Federal Rule of Criminal Procedure 52(b) authorizes reviewing courts to correct "[a] plain error that affects substantial rights . . . even though it was not brought to the court's attention." Although I agree with the Court that this Rule does not independently justify the Eighth Circuit's decision, see *ante*, at 247, I believe that the Rule's underlying policy sheds some light on the issue before us. We have explained that courts may rely on Rule 52(b) to correct only those plain errors that "'seriously affec[t] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, *supra*, at 736 (quoting *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936)). We have thus recognized that preservation of the "fairness, integrity or public reputation of judicial proceedings" may sometimes justify a departure from the traditional adversarial framework of issue presentation.

Perhaps the closest analogue to the cross-appeal requirement is the rule of appellate practice that restrains reviewing courts from addressing arguments that the parties have

not made. Courts typically invoke this rule to avoid resolving a case based on an unaired argument, even if the argument could change the outcome. See, *e. g.*, *Santiago* v. *Rumsfeld*, 425 F. 3d 549, 552, n. 1 (CA9 2005); *United States* v. *Cervini*, 379 F. 3d 987, 994, n. 5 (CA10 2004). But courts also recognize that the rule is not inflexible, see, *e. g.*, *Santiago*, *supra*, at 552, n. 1, and sometimes they depart from it, see, *e. g.*, *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 448 (1993) ("After giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law" (citing *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281, 289 (1917))); *United States* v. *Moyer*, 282 F. 3d 1311, 1317–1318 (CA10 2002); *Dorris* v. *Absher*, 179 F. 3d 420, 425–426 (CA6 1999).

A reviewing court will generally address an argument *sua sponte* only to correct the most patent and serious errors. See, *e. g.*, *id.*, at 426 (concluding that the error, if overlooked, would result in "a miscarriage of justice"); *Consumers Union of U. S., Inc.* v. *Federal Power Comm'n*, 510 F. 2d 656, 662 (CADC 1974) (balancing "considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking"). Because the prejudicial effect of the error and the impact of error correction on judicial resources are matters best determined by the reviewing court, the court's decision to go beyond the arguments made by the parties is committed to its sound discretion. See *United States Nat. Bank of Ore.*, *supra*, at 448 (reviewing an appellate court's decision to address an argument *sua sponte* for abuse of discretion).

This authority provides a good model for our decision in this case. The Court has not persuaded me that the interests at stake when a reviewing court awards a nonappealing party additional relief are qualitatively different from the

interests at stake when a reviewing court raises an issue *sua sponte*. Authority on the latter point recognizes that the interest of the public and the Judiciary in correcting grossly prejudicial errors of law may sometimes outweigh other interests normally furthered by fidelity to our adversarial tradition. I would recognize the same possibility here. And just as reviewing courts enjoy discretion to decide for themselves when to raise and decide arguments *sua sponte*, I would grant them substantial latitude to decide when to enlarge an appellee's judgment in the absence of a cross-appeal.[1]

III

The approach I advocate is not out of step with our precedent. The Court has never decided whether the cross-appeal requirement is "subject to exceptions [or] an unqualified limit on the power of appellate courts." *Neztsosie*, 526 U. S., at 480. That question was reserved in *Neztsosie*, *ibid.*, even as the Court recognized that lower courts had reached different conclusions, see *ibid.*, n. 2. I would simply confirm what our precedent had assumed: that there are exceptional circumstances when it is appropriate for a reviewing court to correct an error for the benefit of a party that has not cross-appealed the decision below.

Indeed, the Court has already reached the very result that it claims to disavow today. We have long held that a sentencing court confronted with new circumstances may impose a stiffer sentence on remand than the defendant received prior to a successful appeal. See *Chaffin* v.

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[1] The Court argues that petitioner's original sentence was neither so fundamentally unfair nor so harmful to our system of justice as to warrant *sua sponte* correction by the Court of Appeals. *Ante*, at 254–255, n. 9. But these considerations, which may well support a conclusion that the Court of Appeals should not have exercised its authority in this case, cf. n. 3, *infra*, surely do not justify the Court's broad rule that *sua sponte* error correction on behalf of the Government is inappropriate in all cases.

Stynchcombe, 412 U. S. 17, 23 (1973); *North Carolina* v. *Pearce*, 395 U. S. 711, 719–720 (1969), overruled on other grounds, *Alabama* v. *Smith*, 490 U. S. 794 (1989). The Court makes no effort to explain the analytical difference between those cases and this one. If a sentencing court may rely on new circumstances to justify a longer sentence on remand, why cannot one of the new circumstances be the court's discovery (by dint of appellate review) that its first sentence was based on an error of law?[2]

Even today, the Court refuses to decide whether the cross-appeal requirement admits of exceptions in appropriate cases. While calling the rule "'inveterate and certain,'" *ante*, at 245 (quoting *Morley Constr. Co.*, 300 U. S., at

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[2]The Court finds it "hard to imagine a case in which a district court, after a court of appeals vacated a criminal sentence, could properly increase the sentence based on an error the appeals court left uncorrected because of the cross-appeal rule." *Ante*, at 254, n. 8. Happily, we need not imagine such cases, since they come before our courts every day.

For examples, we have no further to look than the sentencing cases remanded en masse following our recent decision in *United States* v. *Booker*, 543 U. S. 220 (2005). In *Booker*'s wake, it was common for newly convicted defendants to appeal their sentences, claiming that they received enhancements that they would not have received under the advisory guidelines. Many of those cases were remanded for resentencing, and some defendants wound up with even longer sentences on remand. See, *e. g.*, *United States* v. *Singletary*, 458 F. 3d 72, 77 (CA2) (affirming a sentence lengthened by 12 months following a *Booker* remand), cert. denied, 549 U. S. 1047 (2006); *United States* v. *Reinhart*, 442 F. 3d 857, 860–861 (CA5 2006) (affirming a sentence lengthened from 210 months to 235 months following a *Booker* remand).

These cases represent straightforward applications of the cross-appeal rule: The Government had not cross-appealed the sentence, so the reviewing court did not order the defendant's sentence lengthened. And yet the sentence *was* ultimately lengthened when the error was corrected on remand. The Court fails to explain the conceptual distinction between those cases and this one. If the Court permits sentencing courts to correct unappealed errors on remand, why does it not permit the courts of appeals to do the same on appeal?

191), the Court allows that "there might be circumstances in which it would be proper for an appellate court to initiate plain-error review," *ante*, at 248; see also *ante*, at 244, n. 2. The Court's mandate is limited to a single class of cases—sentencing appeals, and then only when the appeal is brought by the Government.

The Court justifies the asymmetry in its decision by pointing to 18 U. S. C. §3742(b), which provides that "[t]he Government may not further prosecute [the] appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." According to the majority, "[i]t would severely undermine Congress' instruction were appellate judges to 'sally forth' on their own motion to take up errors adverse to the Government when the designated Department of Justice officials have not authorized an appeal from the sentence the trial court imposed." *Ante*, at 246 (citation omitted).

The problem with this argument is that §3742(b) does not apportion authority over sentencing appeals between the Executive and Judicial Branches. By its terms, §3742(b) simply apportions that authority *within* an executive department. It provides that "[t]he Government" may not "prosecute" the appeal without approval from one of the listed officials. It says nothing about the power of the courts to correct error in the absence of a Government appeal. Had Congress intended to restrict the power of the courts, the statute would not stop "[t]he Government" from "prosecut[ing]" unauthorized appeals; instead, it would stop "the Court of Appeals" from "deciding" them.

The design that the Court imputes to the drafters of §3742(b) is inconsistent with the text in another important respect. Suppose that the District Court imposes a sentence below the range set forth in the Federal Sentencing Guidelines, and the Government files an authorized appeal on the ground that the sentence is unreasonable. Suppose further that the reviewing court discovers, to the surprise of

both parties, that the District Court made a further error by overlooking a mandatory minimum to which the defendant was subject. The mandatory minimum would raise the defendant's sentence beyond what even the Government had wanted. Under the majority's theory, see *ante*, at 246, the reviewing court should not remand for imposition of the mandatory minimum, since the decision to seek the higher sentence belonged to the Government alone. But that conclusion is plainly at odds with the text of the statute, which imposes no limits on sentencing review once the named officials have signed off on the appeal.

Section 3742(b)'s limited effect on sentencing review implies that the statute was not designed to prevent judicial encroachment on the prerogatives of the Executive. It is more likely that Congress wanted to withhold from the Executive the power to force the courts of appeals to entertain Government appeals that are not regarded as sufficiently important by the leadership of the Department of Justice. Allowing the courts of appeals, in their discretion, to remedy errors not raised in a cross-appeal in no way trenches on the authority of the Executive. Section 3742(b) may have also been designed to serve the Executive's institutional interests. Congress may have wanted to ensure that the Government maintained a consistent legal position across different sentencing appeals. Or perhaps Congress wanted to maximize the impact of the Government's sentencing appeals by giving high-level officials the authority to nix meritless or marginal ones. These institutional interests of the Executive do not undermine the Judiciary's authority to correct unlawful sentences in the absence of a Government appeal, and they do not justify the Court's decision today.

IV

For the reasons given above, I would hold that the courts of appeals enjoy the discretion to correct error *sua sponte*

for the benefit of nonappealing parties. The Court errs in vacating the judgment of the Eighth Circuit, and I respectfully dissent.[3]

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[3] Neither the parties nor our *amicus* have addressed whether, under the assumption that the Court of Appeals enjoys discretion to initiate error correction for the benefit of a nonappealing party, the Eighth Circuit abused that discretion in this case. As framed by petitioner, the question presented asked only whether the cross-appeal requirement is subject to exceptions. Because the parties have not addressed the fact-bound subsidiary question, I would affirm without reaching it. See *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855, n. 3 (1996).

Syllabus

SPRINT COMMUNICATIONS CO., L. P., ET AL. *v.* APCC SERVICES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07–552. Argued April 21, 2008—Decided June 23, 2008

A payphone customer making a long-distance call with an access code or 1–800 number issued by a long-distance carrier pays the carrier (which completes the call). The carrier then compensates the payphone operator (which connects the call to the carrier in the first place). The payphone operator can sue the long-distance carrier for any compensation that the carrier fails to pay for these "dial-around" calls. Many payphone operators assign their dial-around claims to billing and collection firms (aggregators) so that, in effect, these aggregators can bring suit on their behalf. A group of aggregators (respondents here) were assigned legal title to the claims of approximately 1,400 payphone operators. The aggregators separately agreed to remit all proceeds to those operators, who would then pay the aggregators for their services. After entering into these agreements, the aggregators filed federal-court lawsuits seeking compensation from petitioner long-distance carriers. The District Court refused to dismiss the claims, finding that the aggregators had standing, and the D. C. Circuit ultimately affirmed.

Held: An assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor. Pp. 273–292.

(a) History and precedent show that, for centuries, courts have found ways to allow assignees to bring suit; where assignment is at issue, courts—both before and after the founding—have always permitted the party with legal title alone to bring suit; and there is a strong tradition specifically of suits by assignees for collection. And while precedents of this Court, *Waite* v. *Santa Cruz*, 184 U. S. 302, *Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117, and *Titus* v. *Wallick*, 306 U. S. 282, do not conclusively resolve the standing question here, they offer powerful support for the proposition that suits by assignees for collection have long been seen as "amenable" to resolution by the judicial process, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 102. Pp. 273–285.

(b) Petitioners offer no convincing reason to depart from the historical tradition of suits by assignees, including assignees for collection. In any event, the aggregators satisfy the Article III standing requirements

articulated in this Court's more modern decisions. Petitioners argue that the aggregators have not themselves suffered an injury and that assignments for collection do not transfer the payphone operators' injuries. But the operators assigned their claims lock, stock, and barrel, and precedent makes clear that an assignee can sue based on his assignor's injuries. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765. In arguing that the aggregators cannot satisfy the redressability requirement because they will remit their recovery to the payphone operators, petitioners misconstrue the nature of the redressability inquiry, which focuses on whether the *injury* that a plaintiff alleges is likely to be redressed through the litigation—not on what the plaintiff ultimately intends to do with the money recovered. See, *e. g.*, *id.*, at 771. Petitioners' claim that the assignments constitute nothing more than a contract for legal services is overstated. There is an important distinction between simply hiring a lawyer and assigning a claim to a lawyer. The latter confers a property right (which creditors might attach); the former does not. Finally, as a practical matter, it would be particularly unwise to abandon history and precedent in resolving the question here, for any such ruling could be overcome by, *e. g.*, rewriting the agreement to give the aggregator a tiny portion of the assigned claim itself, perhaps only a dollar or two. Pp. 285–289.

(c) Petitioners' reasons for denying prudential standing—that the aggregators are seeking redress for third parties; that the litigation represents an effort by the aggregators and payphone operators to circumvent Federal Rule of Civil Procedure 23's class-action requirements; and that practical problems could arise because the aggregators are suing, *e. g.*, payphone operators may not comply with discovery requests or honor judgments—are unpersuasive. And because there are no allegations that the assignments were made in bad faith and because the assignments were made for ordinary business purposes, any other prudential questions need not be considered here. Pp. 289–292.

489 F. 3d 1249, affirmed.

BREYER, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post*, p. 298.

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *David W. Carpenter*, *Thomas C. Goldstein*, *Patricia A. Millett*, and *David P. Murray*.

Roy T. Englert, Jr., argued the cause for respondents. With him on the brief were *Donald J. Russell* and *Michael W. Ward.**

JUSTICE BREYER delivered the opinion of the Court.

The question before us is whether an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor. Because history and precedent make clear that such an assignee has long been permitted to bring suit, we conclude that the assignee does have standing.

I

When a payphone customer makes a long-distance call with an access code or 1–800 number issued by a long-distance communications carrier, the customer pays the carrier (which completes that call), but not the payphone operator (which connects that call to the carrier in the first place). In these circumstances, the long-distance carrier is required to compensate the payphone operator for the customer's call. See 47 U. S. C. §226; 47 CFR §64.1300 (2007). The payphone operator can sue the long-distance carrier in court for any compensation that the carrier fails to pay for these "dial-around" calls. And many have done so. See *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, 550 U. S. 45 (2007) (finding that the Communications Act of 1934 authorizes such suits).

Because litigation is expensive, because the evidentiary demands of a single suit are often great, and because the resulting monetary recovery is often small, many payphone operators assign their dial-around claims to billing and collection firms called "aggregators" so that, in effect, these

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**Douglas P. Lobel*, *David A. Vogel*, and *Lori R. E. Ploeger* filed a brief for Qwest Communications Corp. as *amicus curiae* urging reversal.

Bruce D. Sokler and *Robert G. Kidwell* filed a brief for NetworkIP, LLC, et al. as *amicus curiae*.

aggregators can bring suit on their behalf. See Brief for Respondents 3. Typically, an individual aggregator collects claims from different payphone operators; the aggregator promises to remit to the relevant payphone operator (*i. e.*, the assignor of the claim) any dial-around compensation that is recovered; the aggregator then pursues the claims in court or through settlement negotiations; and the aggregator is paid a fee for this service.

The present litigation involves a group of aggregators who have taken claim assignments from approximately 1,400 payphone operators. Each payphone operator signed an Assignment and Power of Attorney Agreement (Agreement) in which the payphone operator "assigns, transfers and sets over to [the aggregator] for purposes of collection all rights, title and interest of the [payphone operator] in the [payphone operator's] claims, demands or causes of action for 'Dial-Around Compensation' . . . due the [payphone operator] for periods since October 1, 1997." App. to Pet. for Cert. 114. The Agreement also "appoints" the aggregator as the payphone operator's "true and lawful attorney-in-fact." *Ibid.* The Agreement provides that the aggregator will litigate "in the [payphone operator's] interest." *Id.*, at 115. And the Agreement further stipulates that the assignment of the claims "may not be revoked without the written consent of the [aggregator]." *Ibid.* The aggregator and payphone operator then separately agreed that the aggregator would remit all proceeds to the payphone operator and that the payphone operator would pay the aggregator for its services (typically via a quarterly charge).

After signing the agreements, the aggregators (respondents here) filed lawsuits in federal court seeking dial-around compensation from Sprint, AT&T, and other long-distance carriers (petitioners here). AT&T moved to dismiss the claims, arguing that the aggregators lack standing to sue under Article III of the Constitution. The District Court initially agreed to dismiss, *APCC Servs., Inc.* v. *AT&T Corp.*,

254 F. Supp. 2d 135, 140–141 (DC 2003), but changed its mind in light of a "long line of cases and legal treatises that recognize a well-established principle that assignees for collection purposes are entitled to bring suit where [as here] the assignments transfer absolute title to the claims." *APCC Servs., Inc.* v. *AT&T Corp.*, 281 F. Supp. 2d 41, 45 (DC 2003). After consolidating similar cases, a divided panel of the Court of Appeals for the District of Columbia Circuit agreed that the aggregators have standing to sue, but held that the relevant statutes do not create a private right of action. *APCC Servs., Inc.* v. *Sprint Communications Co.*, 418 F. 3d 1238 (2005) *(per curiam)*. This Court granted the aggregators' petition for certiorari on the latter statutory question, vacated the judgment, and remanded the case for reconsideration in light of *Global Crossing*, *supra*. *APCC Services, Inc.* v. *Sprint Communications Co.*, 550 U. S. 901 (2007). On remand, the Court of Appeals affirmed the orders of the District Court allowing the litigation to go forward. 489 F. 3d 1249, 1250 (2007) *(per curiam)*. The long-distance carriers then asked us to consider the standing question. We granted certiorari, and we now affirm.

II

We begin with the most basic doctrinal principles: Article III, §2, of the Constitution restricts the federal "judicial Power" to the resolution of "Cases" and "Controversies." That case-or-controversy requirement is satisfied only where a plaintiff has standing. See, *e. g.*, *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332 (2006). And in order to have Article III standing, a plaintiff must adequately establish: (1) an injury in fact (*i. e.*, a "concrete and particularized" invasion of a "legally protected interest"); (2) causation (*i. e.*, a "'fairly . . . trace[able]'" connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (*i. e.*, it is "'likely'" and not "merely 'speculative'" that the plaintiff's injury will be remedied by the relief plain-

tiff seeks in bringing suit). *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (calling these the "irreducible constitutional minimum" requirements).

In *some* sense, the aggregators clearly meet these requirements. They base their suit upon a concrete and particularized "injury in fact," namely, the carriers' failure to pay dial-around compensation. The carriers "caused" that injury. And the litigation will "redress" that injury—if the suits are successful, the long-distance carriers will pay what they owe. The long-distance carriers argue, however, that the aggregators lack standing because it was the payphone operators (who are not plaintiffs), not the aggregators (who are plaintiffs), who were "injured in fact" and that it is the payphone operators, not the aggregators, whose injuries a legal victory will truly "redress": The aggregators, after all, will remit all litigation proceeds to the payphone operators. Brief for Petitioners 18. Thus, the question before us is whether, under these circumstances, an assignee has standing to pursue the assignor's claims for money owed.

We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider. See, *e. g.*, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 102 (1998) ("We have always taken [the case-or-controversy requirement] to mean cases and controversies of the sort *traditionally* amenable to, and resolved by, the judicial process" (emphasis added)); *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.*, 445 U. S. 375, 382 (1980) ("The purpose of the case-or-controversy requirement is to limit the business of federal courts to questions presented in an adversary context and in a form *historically viewed* as capable of resolution through the judicial process" (emphasis added; internal quotation marks omitted)); cf. *Coleman* v. *Miller*, 307 U. S. 433, 460 (1939) (opinion of Frankfurter, J.) (in crafting Article III, "the framers . . . gave merely the outlines of what were to

them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union"). Consequently, we here have carefully examined how courts have historically treated suits by assignors and assignees. And we have discovered that history and precedent are clear on the question before us: Assignees of a claim, including assignees for collection, have long been permitted to bring suit. A clear historical answer at least demands reasons for change. We can find no such reasons here, and accordingly we conclude that the aggregators have standing.

A

We must begin with a minor concession. Prior to the 17th century, English law would not have authorized a suit like this one. But that is because, with only limited exceptions, English courts refused to recognize assignments at all. See, *e. g.*, *Lampet's Case*, 10 Co. Rep. 46b, 48a, 77 Eng. Rep. 994, 997 (K. B. 1612) (stating that "no possibility, right, title, nor thing in action, shall be granted or assigned to strangers" (footnote omitted)); *Penson & Higbed's Case*, 4 Leo. 99, 74 Eng. Rep. 756 (K. B. 1590) (refusing to recognize the right of an assignee of a right in contract); see also 9 J. Murray, Corbin on Contracts § 47.3, p. 134 (rev. ed. 2007) (noting that the King was excepted from the basic rule and could, as a result, always receive assignments).

Courts then strictly adhered to the rule that a "chose in action"—an interest in property not immediately reducible to possession (which, over time, came to include a financial interest such as a debt, a legal claim for money, or a contractual right)—simply "could not be transferred to another person by the strict rules of the ancient common law." See 2 W. Blackstone, Commentaries *442. To permit transfer, the courts feared, would lead to the "multiplying of contentions and suits," *Lampet's Case*, *supra*, at 48a, 77 Eng. Rep., at 997, and would also promote "maintenance," *i. e.*, officious in-

termeddling with litigation, see Holdsworth, History of the Treatment of *Choses* in Action by the Common Law, 33 Harv. L. Rev. 997, 1006–1009 (1920).

As the 17th century began, however, strict anti-assignment rules seemed inconsistent with growing commercial needs. And as English commerce and trade expanded, courts began to liberalize the rules that prevented assignments of choses in action. See 9 Corbin, *supra*, §47.3, at 134 (suggesting that the "pragmatic necessities of trade" induced "evolution of the common law"); Holdsworth, *supra*, at 1021–1022 (the "common law" was "induced" to change because of "considerations of mercantile convenience or necessity"); J. Ames, Lectures on Legal History 214 (1913) (noting that the "objection of maintenance" yielded to "the modern commercial spirit"). By the beginning of the 18th century, courts routinely recognized assignments of equitable (but not legal) interests in a chose in action: Courts of equity permitted suits by an assignee who had equitable (but not legal) title. And courts of law effectively allowed suits either by the assignee (who had equitable, but not legal title) or the assignor (who had legal, but not equitable title).

To be more specific, courts of equity would simply permit an assignee with a beneficial interest in a chose in action to sue in his own name. They might, however, require the assignee to bring in the assignor as a party to the action so as to bind him to whatever judgment was reached. See, *e. g.*, *Warmstrey* v. *Tanfield*, 1 Ch. Rep. 29, 21 Eng. Rep. 498 (1628–1629); *Fashion* v. *Atwood*, 2 Ch. Cas. 36, 22 Eng. Rep. 835 (1688); *Peters* v. *Soame*, 2 Vern. 428, 428–429, 23 Eng. Rep. 874 (Ch. 1701); *Squib* v. *Wyn*, 1 P. Wms. 378, 381, 24 Eng. Rep. 432, 433 (Ch. 1717); *Lord Carteret* v. *Paschal*, 3 P. Wms. 197, 199, 24 Eng. Rep. 1028, 1029 (Ch. 1733); *Row* v. *Dawson*, 1 Ves. sen. 331, 332–333, 27 Eng. Rep. 1064, 1064–1065 (Ch. 1749). See also M. Smith, Law of Assignment: The Creation and Transfer of Choses in Action 131 (2007) (by the beginning of the 18th century, "it became settled that

equity would recognize the validity of the assignment of both debts and of other things regarded by the common law as choses in action").

Courts of law, meanwhile, would permit the assignee with an equitable interest to bring suit, but nonetheless required the assignee to obtain a "power of attorney" from the holder of the legal title, namely, the assignor, and further required the assignee to bring suit *in the name of that assignor*. See, *e. g.*, Cook, Alienability of Choses in Action, 29 Harv. L. Rev. 816, 822 (1916) ("[C]ommon law lawyers were able, through the device of the 'power of attorney' . . . to enable the assignee to obtain relief in common law proceedings by suing in the name of the assignor"); 29 R. Lord, Williston on Contracts § 74:2, pp. 214–215 (4th ed. 2003). Compare, *e. g.*, *Barrow* v. *Gray*, Cro. Eliz. 551, 78 Eng. Rep. 797 (K. B. 1653), and *South & Marsh's Case*, 3 Leo. 234, 74 Eng. Rep. 654 (Exch. 1686) (limiting the use of a power of attorney to cases in which the assignor owed the assignee a debt), with Holdsworth, *supra*, at 1021 (noting that English courts abandoned that limitation by the end of the 18th century). At the same time, courts of law would permit an assignor to sue *even when he had transferred away his beneficial interest*. And they permitted the assignor to sue in such circumstances precisely because the assignor retained legal title. See, *e. g.*, *Winch* v. *Keeley*, 1 T. R. 619, 99 Eng. Rep. 1284 (K. B. 1787) (allowing the bankrupt assignor of a chose in action to sue a debtor for the benefit of the assignee because the assignor possessed legal, though not equitable, title).

The upshot is that by the time Blackstone published volume II of his Commentaries in 1766, he could dismiss the "ancient common law" prohibition on assigning choses in action as a "nicety . . . now disregarded." 2 Blackstone, *supra*, at *442.

B

Legal practice in the United States largely mirrored that in England. In the latter half of the 18th century and

throughout the 19th century, American courts regularly "exercised their powers in favor of the assignee," both at law and in equity. 9 Corbin on Contracts §47.3, at 137. See, *e. g.*, *McCullum* v. *Coxe*, 1 Dall. 139 (Pa. 1785) (protecting assignee of a debt against a collusive settlement by the assignor); *Dennie* v. *Chapman*, 1 Root 113, 115 (Conn. Super. 1789) (assignee of a nonnegotiable note can bring suit "in the name of the original promisee or his administrator"); *Andrews* v. *Beecker*, 1 Johns. Cas. 411, 411–412, n. (N. Y. Sup. Ct. 1800) *(per curiam)* ("Courts of law . . . are, in justice, bound to protect the rights of the assignees, as much as a court of equity, though they may still require the action to be brought in the name of the assignor"); *Riddle & Co.* v. *Mandeville*, 5 Cranch 322 (1809) (assignees of promissory notes entitled to bring suit in equity). Indeed, §11 of the Judiciary Act of 1789 specifically authorized federal courts to take "cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee" so long as federal jurisdiction would lie if the assignor himself had brought suit. 1 Stat. 79.

Thus, in 1816, Justice Story, writing for a unanimous Court, summarized the practice in American courts as follows: "Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection." *Welch* v. *Mandeville*, 1 Wheat. 233, 236. He added that courts of equity have "disregarded the rigid strictness of the common law, and protected the rights of the assignee of choses in action," and noted that courts of common law "now consider an assignment of a chose in action as substantially valid, only preserving, in certain cases, the form of an action commenced in the name of the assignor." *Id.*, at 237, n.

It bears noting, however, that at the time of the founding (and in some States well before then) the law did permit the assignment of legal title to at least some choses in action.

In such cases, the assignee could bring suit on the assigned claim in his own name, in a court of law. See, *e. g.*, Act of Oct. 1705, Ch. XXXIV, 3 Va. Stat. 378 (W. Hening ed. 1823) (reprinted 1969) (permitting any person to "assign or transfer any bond or bill for debt over to any other person" and providing that "the assignee or assignees, his and their executors and administrators by virtue of such assignment shall and may have lawfull power to commence and prosecute any suit at law in his or their own name or names"); Act of May 28, 1715, Ch. XXVIII, Gen. Laws of Penn. 60 (J. Dunlop comp. 2d ed. 1849) (permitting the assignment of "bonds, specialties, and notes" and authorizing "the person or persons, to whom the said bonds, specialties or notes, are . . . assigned" to "commence and prosecute his, her or their actions at law"); Patent Act of 1793, ch. 11, § 4, 1 Stat. 322 ("[I]t shall be lawful for any inventor, his executor or administrator to assign the title and interest in the said invention, at anytime, and the assignee . . . shall thereafter stand in the place of the original inventor, both as to right and responsibility").

C

By the 19th century, courts began to consider the specific question presented here: whether an assignee of a legal claim for money could sue when that assignee had promised to give all litigation proceeds back to the assignor. During that century American law at the state level became less formalistic through the merger of law and equity, through statutes more generously permitting an assignor to pass legal title to an assignee, and through the adoption of rules that permitted any "real party in interest" to bring suit. See 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1541, pp. 320–321 (2d ed. 1990) (hereinafter Wright & Miller); see also 9 Corbin, *supra*, § 47.3, at 137. The courts recognized that pre-existing law permitted an assignor to bring suit on a claim even though the assignor retained nothing more than naked legal title. Since the law

increasingly permitted the transfer of legal title to an assignee, courts agreed that assignor and assignee should be treated alike in this respect. And rather than abolish the assignor's well-established right to sue on the basis of naked legal title alone, many courts instead *extended the same right to an assignee.* See, *e. g.*, Clark & Hutchins, The Real Party in Interest, 34 Yale L. J. 259, 264–265 (1925) (noting that the changes in the law permitted both the assignee with "naked legal title" and the assignee with an equitable interest in a claim to bring suit).

Thus, during the 19th century, most state courts entertained suits virtually identical to the litigation before us: suits by individuals who were assignees for collection only, *i. e.*, assignees who brought suit to collect money owed to their assignors but who promised to turn over to those assignors the proceeds secured through litigation. See, *e. g.*, *Webb & Hepp* v. *Morgan, McClung & Co.*, 14 Mo. 428, 431 (1851) (holding that the assignees of a promissory note for collection only can bring suit, even though they lack a beneficial interest in the note, because the assignment "creates in them such legal interest, that they thereby become the persons to sue"); *Meeker* v. *Claghorn*, 44 N. Y. 349, 350, 353 (1871) (allowing suit by the assignee of a cause of action even though the assignors "'expected to receive the amount recovered in the action,'" because the assignee, as "legal holder of the claim," was "the real party in interest"); *Searing* v. *Berry*, 58 Iowa 20, 23, 24, 11 N. W. 708, 709 (1882) (where legal title to a judgment was assigned "merely for the purpose of enabling plaintiff to enforce its collection" and the assignor in fact retained the beneficial interest, the plaintiff-assignee could "prosecute this suit to enforce the collection of the judgment"); *Grant* v. *Heverin*, 77 Cal. 263, 265, 19 P. 493 (1888) (holding that the assignee of a bond could bring suit, even though he lacked a beneficial interest in the bond, and adopting the rule that an assignee with legal title to an assigned claim can bring suit even where the assignee must "account to the assignor" for "a part of the pro-

ceeds" or "is to account for the whole proceeds" (internal quotation marks omitted)); *McDaniel* v. *Pressler*, 3 Wash. 636, 638, 637, 29 P. 209, 210 (1892) (holding that the assignee of promissory notes was the real party in interest, even though the assignment was "for the purpose of collection" and the assignee had "no interest other than that of the legal holder of said notes"); *Wines* v. *Rio Grande W. R. Co.*, 9 Utah 228, 235, 33 P. 1042, 1044, 1045 (1893) (holding that an assignee could bring suit based on causes of action assigned to him "simply to enable him to sue" and who "would turn over to the assignors all that was recovered in the action, after deducting [the assignors'] proportion of the expenses of the suit"); *Gomer* v. *Stockdale*, 5 Colo. App. 489, 492, 39 P. 355, 357, 356 (1895) (permitting suit by a party who was assigned legal title to contractual rights, where the assignor retained the beneficial interest, noting that the doctrine that "prevails in Colorado" is that the assignee may bring suit in his own name "although there may be annexed to the transfer the condition that when the sum is collected the whole or some part of it must be paid over to the assignor"). See also Appendix, *infra* (collecting cases from numerous other States approving of suits by assignees for collection).

Of course, the dissent rightly notes, *some* States during this period of time refused to recognize assignee-for-collection suits, or otherwise equivocated on the matter. See *post*, at 309 (opinion of ROBERTS, C. J.). But so *many* States allowed these suits that by 1876, the distinguished procedure and equity scholar John Norton Pomeroy declared it "settled by a *great preponderance* of authority, although there is some conflict" that an assignee is "entitled to sue in his own name" whenever the assignment vests "legal title" in the assignee, and notwithstanding "any contemporaneous, collateral agreement by virtue of which he is to receive a part only of the proceeds . . . or even is to thus account [to the assignor] for the *whole* proceeds." Remedies and Remedial Rights § 132, p. 159 (internal quotation marks omitted; emphasis added). Other contemporary scholars reached the

same basic conclusion. See, *e. g.*, P. Bliss, A Treatise Upon the Law of Pleading § 51, p. 69 (2d ed. 1887) (stating that "*[m]ost of the courts* have held that where negotiable paper has been indorsed, or other choses in action have been assigned, it does not concern the defendant for what purpose the transfer has been made" and giving examples of States permitting assignees to bring suit even where they lacked a beneficial interest in the assigned claims (emphasis added)). See also Clark & Hutchins, *supra*, at 264 ("*[M]any, probably most, American jurisdictions*" have held that "an assignee who has no beneficial interest, like an assignee for collection only, may prosecute an action in his own name" (emphasis added)). Even Michael Ferguson's California Law Review Comment—which the dissent cites as support for its argument about "the divergent practice" among the courts, *post*, at 310—recognizes that "*[a] majority of courts* has held that an assignee for collection only is a real party in interest" entitled to bring suit. See Comment, The Real Party in Interest Rule Revitalized: Recognizing Defendant's Interest in the Determination of Proper Parties Plaintiff, 55 Cal. L. Rev. 1452, 1475 (1967) (emphasis added); see also *id.*, at 1476, n. 118 (noting that even "[t]he few courts that have waivered on the question have always ended up in the camp of the *majority*" (emphasis added)).

During this period, a number of federal courts similarly indicated approval of suits by assignees for collection only. See, *e. g.*, *Bradford* v. *Jenks*, 3 F. Cas. 1132, 1134 (No. 1,769) (CC Ill. 1840) (stating that the plaintiff, the receiver of a bank, could bring suit in federal court to collect on a note owed to that bank if he sued as the bank's *assignee*, not its receiver, but ultimately holding that the plaintiff could not sue as an assignee because there was no diversity jurisdiction); *Orr* v. *Lacy*, 18 F. Cas. 834 (No. 10,589) (CC Mich. 1847) (affirming judgment for the plaintiff, the endorsee of a bill of exchange, on the ground that, as endorsee, he had the "legal right" to bring suit notwithstanding the fact that the pro-

ceeds of the litigation would be turned over to the endorser); *Murdock* v. *The Emma Graham*, 17 F. Cas. 1012, 1013 (No. 9,940) (SD Ohio 1878) (permitting the assignee of a claim for injury to a "float or barge" to bring suit when, "under the assignment," the assignor's *creditors* would benefit from the litigation); *The Rupert City*, 213 F. 263, 266–267 (WD Wash. 1914) (assignees of claims for collection only could bring suit in maritime law because "an assignment for collection . . . vest[s] such an interest in [an] assignee as to entitle him to sue").

Even this Court long ago indicated that assignees for collection only can properly bring suit. For example, in *Waite* v. *Santa Cruz*, 184 U. S. 302 (1902), the plaintiff sued to collect on a number of municipal bonds and coupons whose "legal title" had been vested in him but which were transferred to him "for collection only." *Id.*, at 324. The Court, in a unanimous decision, ultimately held that the federal courts could not hear his suit because the amount-in-controversy requirement of diversity jurisdiction would not have been satisfied if the bondholders and coupon holders had sued individually. See *id.*, at 328–329. However, before reaching this holding, the Court expressly stated that the suit *could* properly be brought in federal court "if the only objection to the jurisdiction of the Circuit Court is that the plaintiff was invested with the legal title to the bonds and coupons simply for purposes of collection." *Id.*, at 325.

Next, in *Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117 (1920), a large number of cattle shippers assigned to Spiller (the secretary of a Cattle Raiser's Association) their individual reparation claims against railroads they said had charged them excessive rates. The Federal Court of Appeals held that Spiller could not bring suit because, in effect, he was an assignee for collection only and would be passing back to the cattle shippers any money he recovered from the litigation. In a unanimous decision, this Court reversed. The Court wrote that the cattle shippers' "assignments were

absolute in form" and "plainly" "vest[ed] the legal title in Spiller." *Id.*, at 134. The Court conceded that the assignments did not pass "beneficial or equitable title" to Spiller. *Ibid.* But the Court then said that "this was not necessary to support the right of the assignee to claim an award of reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims." *Ibid.* The Court thereby held that Spiller's legal title alone was sufficient to allow him to bring suit in federal court on the aggregated claims of his assignors.

Similarly, in *Titus* v. *Wallick*, 306 U. S. 282 (1939), this Court unanimously held that (under New York law) a plaintiff, an assignee for collection, had "dominion over the claim for purposes of suit" because the assignment purported to "'sell, assign, transfer and set over' the chose in action" to the assignee. *Id.*, at 289. More importantly for present purposes, the Court said that the assignment's "legal effect was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another." *Ibid.*

To be clear, we do not suggest that the Court's decisions in *Waite*, *Spiller*, and *Titus* conclusively resolve the standing question before us. We cite them because they offer additional and powerful support for the proposition that suits by assignees for collection have long been seen as "amenable" to resolution by the judicial process. *Steel Co.*, 523 U. S., at 102.

Finally, we note that there is also considerable, more recent authority showing that an assignee for collection may properly sue on the assigned claim in federal court. See, *e. g.*, 6A Wright & Miller § 1545, at 346–348 (noting that an assignee with legal title is considered to be a real party in interest and that as a result "federal courts have held that an assignee for purposes of collection who holds legal title to the debt according to the governing substantive law is the

real party in interest even though the assignee must account to the assignor for whatever is recovered in the action"); 6 Am. Jur. 2d, Assignments § 184, pp. 262–263 (1999) ("An assignee for collection or security only is within the meaning of the real party in interest statutes and entitled to sue in his or her own name on an assigned account or chose in action, although he or she must account to the assignor for the proceeds of the action, even when the assignment is without consideration" (footnote omitted)). See also *Rosenblum* v. *Dingfelder*, 111 F. 2d 406, 407 (CA2 1940); *Staggers* v. *Otto Gerdau Co.*, 359 F. 2d 292, 294 (CA2 1966); *Dixie Portland Flour Mills, Inc.* v. *Dixie Feed & Seed Co.*, 382 F. 2d 830, 833 (CA6 1967); *Klamath-Lake Pharmaceutical Assn.* v. *Klamath Medical Serv. Bur.*, 701 F. 2d 1276, 1282 (CA9 1983).

D

The history and precedents that we have summarized make clear that courts have long found ways to allow assignees to bring suit; that where assignment is at issue, courts—both before and after the founding— have always permitted the party with legal title alone to bring suit; and that there is a strong tradition specifically of suits by assignees for collection. We find this history and precedent "well nigh conclusive" in respect to the issue before us: Lawsuits by assignees, including assignees for collection only, are "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 777–778 (2000) (internal quotation marks omitted).

III

Petitioners have not offered any convincing reason why we should depart from the historical tradition of suits by assignees, including assignees for collection. In any event, we find that the assignees before us satisfy the Article III

standing requirements articulated in more modern decisions of this Court.

Petitioners argue, for example, that the aggregators have not themselves suffered any injury in fact and that the assignments for collection "do not suffice to transfer the payphone operators' injuries." Brief for Petitioners 18. It is, of course, true that the aggregators did not originally suffer any injury caused by the long-distance carriers; the payphone operators did. But the payphone operators assigned their claims to the aggregators lock, stock, and barrel. See *APCC Servs.*, 418 F. 3d, at 1243 (there is "no reason to believe the assignment is anything less than a complete transfer to the aggregator" of the injury and resulting claim); see also App. to Pet. for Cert. 114 (Agreement provides that each payphone operator "assigns, transfers and sets over" to the aggregator "all rights, title and interest" in dial-around compensation claims). And within the past decade we have expressly held that an assignee can sue based on his assignor's injuries. In *Vermont Agency*, *supra*, we considered whether a *qui tam* relator possesses Article III standing to bring suit under the False Claims Act, which authorizes a private party to bring suit to remedy an injury (fraud) that the United States, not the private party, suffered. We held that such a relator does possess standing. And we said that is because the Act "effect[s] a partial assignment of the Government's damages claim" and that assignment of the "United States' injury in fact suffices to confer standing on [the relator]." *Id.*, at 773, 774. Indeed, in *Vermont Agency* we stated quite unequivocally that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.*, at 773.

Petitioners next argue that the aggregators cannot satisfy the redressability requirement of standing because, if successful in this litigation, the aggregators will simply remit the litigation proceeds to the payphone operators. But petitioners misconstrue the nature of our redressability inquiry.

That inquiry focuses, as it should, on whether the *injury* that a plaintiff alleges is likely to be redressed through the litigation—not on what the plaintiff ultimately intends to do with the money he recovers. See, *e. g.*, *id.*, at 771 (to demonstrate redressability, the plaintiff must show a "substantial likelihood that the requested relief will remedy *the alleged injury in fact*" (internal quotation marks omitted; emphasis added)); *Lujan*, 504 U. S., at 561 ("[I]t must be likely . . . that the *injury* will be redressed by a favorable decision" (internal quotation marks omitted; emphasis added)). Here, a legal victory would unquestionably redress the *injuries* for which the aggregators bring suit. The aggregators' injuries relate to the failure to receive the required dial-around compensation. And if the aggregators prevail in this litigation, the long-distance carriers would write a check to the aggregators for the amount of dial-around compensation owed. What does it matter what the aggregators do with the money afterward? The injuries would be redressed whether the aggregators remit the litigation proceeds to the payphone operators, donate them to charity, or use them to build new corporate headquarters. Moreover, the statements our prior cases made about the need to show redress of the *injury* are consistent with what numerous authorities have long held in the assignment context, namely, that an assignee for collection may properly bring suit to redress the injury originally suffered by his assignor. Petitioners might disagree with those authorities. But petitioners have not provided us with a good reason to reconsider them.

The dissent argues that our redressability analysis "could not be more wrong," because "[w]e have never approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the court. Never." *Post*, at 302. But federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards;

receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth. The dissent's view of redressability, if taken seriously, would work a sea change in the law. Moreover, to the extent that trustees, guardians ad litem, and the like have some sort of "obligation" to the parties whose interests they vindicate through litigation, see *post*, at 304–305, n. 2, the same is true in respect to the aggregators here. The aggregators have a *contractual* obligation to litigate "in the [payphone operator's] interest." App. to Pet. for Cert. 115a. (And if the aggregators somehow violate that contractual obligation, say, by agreeing to settle the claims against the long-distance providers in exchange for a kickback from those providers, each payphone operator would be able to bring suit for breach of contract.)

Petitioners also make a further conceptual argument. They point to cases in which this Court has said that a party must possess a "personal stake" in a case in order to have standing under Article III. See *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). And petitioners add that, because the aggregators will not actually benefit from a victory in this case, they lack a "personal stake" in the litigation's outcome. The problem with this argument is that the general "personal stake" requirement and the more specific standing requirements (injury in fact, redressability, and causation) are flip sides of the same coin. They are simply different descriptions of the same judicial effort to ensure, in every case or controversy, "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Ibid.* See also *Massachusetts* v. *EPA*, 549 U. S. 497, 517 (2007) ("At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness" (internal quotation marks omitted)). Courts, during the past two centuries, appear to have

found that "concrete adverseness" where an assignee for collection brings a lawsuit. And petitioners have provided us with no grounds for reaching a contrary conclusion.

Petitioners make a purely functional argument, as well. Read as a whole, they say, the assignments in this litigation constitute nothing more than a contract for legal services. We think this argument is overstated. There is an important distinction between simply hiring a lawyer and assigning a claim to a lawyer (on the lawyer's promise to remit litigation proceeds). The latter confers a property right (which creditors might attach); the former does not.

Finally, we note, as a practical matter, that it would be particularly unwise for us to abandon history and precedent in resolving the question before us. Were we to agree with petitioners that the aggregators lack standing, our holding could easily be overcome. For example, the Agreement could be rewritten to give the aggregator a tiny portion of the assigned claim itself, perhaps only a dollar or two. Or the payphone operators might assign all of their claims to a "Dial-Around Compensation Trust" and then pay a trustee (perhaps the aggregator) to bring suit on behalf of the trust. Accordingly, the far more sensible course is to abide by the history and tradition of assignee suits and find that the aggregators possess Article III standing.

IV

Petitioners argue that, even if the aggregators have standing under Article III, we should nonetheless deny them standing for a number of prudential reasons. See *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 11 (2004) (prudential standing doctrine "embodies judicially self-imposed limits on the exercise of federal jurisdiction" (internal quotation marks omitted)).

First, petitioners invoke certain prudential limitations that we have imposed in prior cases where a plaintiff has sought to assert the legal claims of third parties. See, *e. g.*,

Warth v. *Seldin*, 422 U. S. 490, 501 (1975) (expressing a "reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties"); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 263 (1977) ("In the ordinary case, a party is denied standing to assert the rights of third persons"); *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 955 (1984) (a plaintiff ordinarily "'cannot rest his claim to relief on the legal rights or interests of third parties'").

These third-party cases, however, are not on point. They concern plaintiffs who seek to assert not their own legal rights, but the legal rights of others. See, *e. g.*, *Warth*, *supra*, at 499 (plaintiff "generally must assert his own *legal rights* and interests, and cannot rest his claim to relief on the *legal rights* or interests of third parties" (emphasis added)); see also *Kowalski* v. *Tesmer*, 543 U. S. 125 (2004) (lawyers lack standing to assert the constitutional rights of defendants deprived of appointed counsel on appeal); *Powers* v. *Ohio*, 499 U. S. 400 (1991) (permitting a criminal defendant to assert rights of juror discriminated against because of race); *Craig* v. *Boren*, 429 U. S. 190 (1976) (permitting beer vendors to assert rights of prospective male customers aged 18 to 21 who, unlike females of the same ages, were barred from purchasing beer). Here, the aggregators are suing based on *injuries* originally suffered by third parties. But the payphone operators assigned to the aggregators all "rights, title and interest" in claims based on those injuries. Thus, in the litigation before us, the aggregators assert what are, due to that transfer, *legal rights of their own*. The aggregators, in other words, are asserting first-party, not third-party, legal rights. Moreover, we add that none of the third-party cases cited by petitioners involved assignments or purported to overturn the longstanding doctrine permitting an assignee to bring suit on an assigned claim.

Second, petitioners suggest that the litigation here simply represents an effort by the aggregators and the payphone

operators to circumvent Federal Rule of Civil Procedure 23's class-action requirements. But we do not understand how "circumvention" of Rule 23 could constitute a basis for denying standing here. For one thing, class actions are permissive, not mandatory. More importantly, class actions constitute but one of several methods for bringing about aggregation of claims, *i. e.*, they are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum. See Rule 20(a) (permitting joinder of multiple plaintiffs); Rule 42 (permitting consolidation of related cases filed in the same district court); 28 U. S. C. § 1407 (authorizing consolidation of pretrial proceedings for related cases filed in multiple federal districts); § 1404 (making it possible for related cases pending in different federal courts to be transferred and consolidated in one district court); D. Herr, Annotated Manual for Complex Litigation § 20.12, p. 279 (4th ed. 2007) (noting that "[r]elated cases pending in different federal courts may be consolidated in a single district" by transfer under 28 U. S. C. § 1404(a)); J. Tidmarsh & R. Trangsrud, Complex Litigation and the Adversary System 473–524 (1998) (section on "Transfer Devices that Aggregate Cases in a Single Venue"). Because the federal system permits aggregation by other means, we do not think that the aggregators should be denied standing simply because the payphone operators chose one aggregation method over another.

Petitioners also point to various practical problems that could arise because the aggregators, rather than the payphone operators, are suing. In particular, they say that the payphone operators may not comply with discovery requests served on them, that the payphone operators may not honor judgments reached in this case, and that petitioners may not be able to bring, in this litigation, counterclaims against the payphone operators. See Brief for Petitioners 46–48. Even assuming all that is so, courts have long permitted assignee lawsuits notwithstanding the fact that such problems

could arise. Regardless, courts are not helpless in the face of such problems. For example, a district court can, if appropriate, compel a party to collect and to produce whatever discovery-related information is necessary. See Fed. Rules Civ. Proc. 26(b)(1), 30–31, 33–36. That court might grant a motion to join the payphone operators to the case as "required" parties. See Rule 19. Or the court might allow the carriers to file a third-party complaint against the payphone operators. See Rule 14(a). And the carriers could always ask the Federal Communications Commission to find administrative solutions to any remaining practical problems. Cf. 47 U. S. C. §276(b)(1)(A) (authorizing the FCC to "prescribe regulations" that "ensure that all payphone service providers are fairly compensated for each and every completed [dial-around] call"). We do not say that the litigation before us calls for the use of any such procedural device. We mention them only to explain the lack of any obvious need for the remedy that the carriers here propose, namely, denial of standing.

Finally, we note that in this litigation, there has been no allegation that the assignments were made in bad faith. We note, as well, that the assignments were made for ordinary business purposes. Were this not so, additional prudential questions might perhaps arise. But these questions are not before us, and we need not consider them here.

V

The judgment of the Court of Appeals is affirmed.

It is so ordered.

APPENDIX

Examples of cases in which state courts entertained or otherwise indicated approval of suits by assignees for collection only. References to "Pomeroy's rule" are references to the statement of law set forth in J. Pomeroy, Remedies and Remedial Rights §132, p. 159 (1876).

1. *Webb & Hepp* v. *Morgan, McClung & Co.*, 14 Mo. 428, 431 (1851) (holding that the assignees of a promissory note for collection only can bring suit, even though they lack a beneficial interest in the note, because the assignment "creates in them such legal interest, that they thereby become the persons to sue");

2. *Castner* v. *Austin Sumner & Co.*, 2 Minn. 44, 47–48 (1858) (holding that the assignees of promissory notes were proper plaintiffs, regardless of the arrangement they and their assignor had made in respect to the proceeds of the litigation, because the defendants "can only raise the objection of a defect of parties to the suit, when it appears that some other person or party than the Plaintiffs have such a *legal* interest in the note that a recovery by the Plaintiffs would not preclude it from being enforced, and they be thereby subjected to the risk of another suit for the same subject-matter" (emphasis added));

3. *Cottle* v. *Cole*, 20 Iowa 481, 485–486 (1866) (holding that the assignee could sue, notwithstanding the possibility that the assignor was the party "beneficially interested in the action," because "[t]he course of decision in this State establishes this rule, viz.: that the party holding the *legal title* of a note or instrument may sue on it though he be an agent or trustee, and liable to account to another for the proceeds of the recovery");

4. *Allen* v. *Brown*, 44 N. Y. 228, 231, 234 (1870) (opinion of Hunt, Comm'r) (holding that the assignee with legal title to a cause of action was "legally the real party in interest" "[e]ven if he be liable to another as a debtor upon his contract for the collection he may thus make");

5. *Meeker* v. *Claghorn*, 44 N. Y. 349, 350, 353 (1871) (opinion of Earl, Comm'r) (allowing suit by the assignee of a cause of action even though the assignors " 'expected to receive the amount recovered in the action,' " because the assignee, as "legal holder of the claim," was "the real party in interest");

6. *Hays* v. *Hathorn*, 74 N. Y. 486, 490 (1878) (holding that so long as an assignee has legal title to the assigned commercial paper, the assignee may bring suit even if the assignment was "merely for the purpose of collection" and he acts merely as "equitable trustee" for the assignor, *i. e.*, the assignor maintains the beneficial interest in the paper);

7. *Searing* v. *Berry*, 58 Iowa 20, 23, 24, 11 N. W. 708, 709 (1882) (where legal title to a judgment was assigned "merely for the purpose of enabling plaintiff to enforce the collection" and the assignor in fact retained the beneficial interest, the plaintiff-assignee could "prosecute this suit to enforce the collection of the judgment");

8. *Haysler* v. *Dawson*, 28 Mo. App. 531, 536 (1888) (holding, in light of the "recognized practice in this state," that the assignee could bring suit to recover on certain accounts even where the assignment of the accounts had been made "with the agreement that they were to [be] [he]ld *solely* for the purpose of [the litigation]," *i. e.*, the assignor maintained the beneficial interest in the accounts (emphasis added));

9. *Grant* v. *Heverin*, 77 Cal. 263, 265, 264, 19 P. 493 (1888) (holding that the assignee of a bond could bring suit, even though he lacked a beneficial interest in the bond, and endorsing Pomeroy's rule as "a clear and correct explication of the law");

10. *Young* v. *Hudson*, 99 Mo. 102, 106, 12 S. W. 632, 633 (1889) (holding that an assignee could sue to collect on an account for merchandise sold, even though the money would be remitted to the assignor, because "[a]n assignee of a chose in action arising out of contract may sue upon it in his own name, though the title was passed to him only for the purpose of collection");

11. *Jackson* v. *Hamm*, 14 Colo. 58, 61, 23 P. 88, 88–89 (1890) (holding that the assignee of a judgment was "the real party in interest" and was "entitled to sue in his own name," even though the beneficial interest in the judgment was held by someone else);

12. *Saulsbury* v. *Corwin*, 40 Mo. App. 373, 376 (1890) (permitting suit by an assignee of a note who "had no interest in the note" on the theory that "[o]ne who holds negotiable paper for collection merely may sue on it in his own name");

13. *Anderson* v. *Reardon*, 46 Minn. 185, 186, 48 N. W. 777 (1891) (where plaintiff had been assigned a claim on the "understanding" that he would remit the proceeds to the assignor less the "amount due him for services already rendered, and to be thereafter rendered" to the assignor, the plaintiff could bring suit, even though he had "already collected on the demand enough to pay his own claim for services up to that time," because "[i]t is no concern of the defendant whether the assignee of a claim receives the money on it in his own right or as trustee of the assignor");

14. *McDaniel* v. *Pressler*, 3 Wash. 636, 638, 637, 29 P. 209, 210 (1892) (holding that the assignee of promissory notes was the real party in interest, even though the assignment was "for the purpose of collection" and the assignee had "no interest other than that of the legal holder of said notes");

15. *Minnesota Thresher Mfg. Co.* v. *Heipler*, 49 Minn. 395, 396, 52 N. W. 33 (1892) (upholding the plaintiff-assignee's judgment where that assignee "held the legal title to the demand" and notwithstanding the fact that "there was an agreement between the [assignor] and the plaintiff that the latter took the [assignment] only for collection");

16. *Wines* v. *Rio Grande W. R. Co.*, 9 Utah 228, 235, 33 P. 1042, 1044, 1045 (1893) (adopting Pomeroy's rule and holding that an assignee could bring suit based on causes of action assigned to him "simply to enable him to sue" and who "would turn over to the assignors all that was recovered in the action, after deducting their proportion of the expenses of the suit");

17. *Greig* v. *Riordan*, 99 Cal. 316, 323, 33 P. 913, 916 (1893) (holding that the plaintiff-assignee could sue on claims assigned by multiple parties "for collection," stating that "[i]t is [a] matter of common knowledge that for the purpose of

saving expense commercial associations and others resort to this method" and repeating the rule that "[i]n such cases the assignee becomes the legal holder of a chose in action, which is sufficient to entitle him to recover");

18. *Gomer* v. *Stockdale*, 5 Colo. App. 489, 492, 39 P. 355, 357, 356 (1895) (permitting suit by a party who was assigned legal title to contractual rights, where the assignor retained the beneficial interest, noting that the doctrine that "prevails in Colorado" is that the assignee may bring suit in his own name "although there may be annexed to the transfer the condition that when the sum is collected the whole or some part of it must be paid over to the assignor");

19. *Cox's Executors* v. *Crockett & Co.*, 92 Va. 50, 58, 57, 22 S. E. 840, 843 (1895) (finding that suit by assignor following an adverse judgment against assignee was barred by res judicata but endorsing Pomeroy's rule that an assignee could bring suit as the "real party in interest" even where the assignee must "account to the assignor, or other person, for the residue, or even is to thus account for the whole proceeds" of the litigation);

20. *Sroufe* v. *Soto Bros. & Co.*, 5 Ariz. 10, 11, 12, 43 P. 221 (1896) (holding that state law permits "a party to maintain an action on an account which has been assigned to him for the purpose of collection, only" because such parties are "holders of the legal title of said accounts");

21. *Ingham* v. *Weed*, 5 Cal. Unreported Cases 645, 649, 48 P. 318, 320 (1897) (holding that the assignees of promissory notes could bring suit where the assignors retained part of the beneficial interest in the outcome, and expressly noting that the assignees could bring suit even if the entire interest in the notes had been assigned to them as "agents for collection" because, citing Pomeroy and prior California cases "to the same effect," an assignee can bring suit where he has "legal title" to a claim, notwithstanding "any contemporaneous collateral agreement" by which he is to account to the

assignor for part or even "the whole proceeds" (internal quotation marks omitted));

22. *Citizens' Bank* v. *Corkings*, 9 S. D. 614, 615, 616, 70 N. W. 1059, 1060, rev'd on other grounds, 10 S. D. 98, 72 N. W. 99 (1897) (holding that where the assignee "took a formal written assignment absolute in terms, but with the understanding that he would take the claim, collect what he could, and turn over to the company the proceeds thereof less the expenses of collection," the assignee could sue because the "rule is that a written or verbal assignment, absolute in terms, and vesting in the assignee the apparent legal title to a chose in action, is unaffected by a collateral contemporaneous agreement respecting the proceeds");

23. *Chase* v. *Dodge*, 111 Wis. 70, 73, 86 N. W. 548, 549 (1901) (adopting New York's rule that an assignee is the real party in interest so long as he "holds the legal title" to an assigned claim, regardless of the existence of "any private or implied understanding" between the assignor and assignee concerning the beneficial interest (internal quotation marks omitted));

24. *Roth* v. *Continental Wire Co.*, 94 Mo. App. 236, 262–264, 68 S. W. 594, 602 (1902) (noting that Missouri has adopted Pomeroy's rule and holding that the trial court did not err in excluding evidence that plaintiff was assigned the cause of action for collection only);

25. *Manley* v. *Park*, 68 Kan. 400, 402, 75 P. 557, 558 (1904) (overruling prior state cases and holding that where the assignment of a bond or note vests legal title in the assignee, the assignee can bring suit even where the assignee promises to remit to the assignor "a part or *all* of the proceeds" (emphasis added));

26. *Eagle Mining & Improvement Co.* v. *Lund*, 14 N. M. 417, 420–422, 94 P. 949, 950 (1908) (adopting the rule that the assignee of a note can bring suit even where the assignor, not the assignee, maintains the beneficial interest in the note);

27. *Harrison* v. *Pearcy & Coleman*, 174 Ky. 485, 488, 487, 192 S. W. 513, 514–515 (1917) (holding that the assignee could bring suit to collect on a note, even though he was "an assignee for the purpose of collection only" and had "no financial interest in the note");

28. *James* v. *Lederer-Strauss & Co.*, 32 Wyo. 377, 233 P. 137, 139 (1925) ("By the clear weight of authority a person to whom a chose in action has been assigned for the purpose of collection may maintain an action thereon . . . and as such is authorized by statute in this state to maintain an action in his own name").

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

The majority concludes that a private litigant may sue in federal court despite having to "pass back . . . all proceeds of the litigation," Brief for Respondents 9, thus depriving that party of any stake in the outcome of the litigation. The majority reaches this conclusion, in flat contravention of our cases interpreting the case-or-controversy requirement of Article III, by reference to a historical tradition that is, at best, equivocal. That history does not contradict what common sense should tell us: There is a legal difference between something and nothing. Respondents have nothing to gain from their lawsuit. Under settled principles of standing, that fact requires dismissal of their complaint.[1]

I

Article III of the Constitution confines the judicial power of the federal courts to actual "Cases" and "Controversies." §2. As we have recently reaffirmed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of

[1] Because respondents have failed to demonstrate that they have Article III standing to bring their claims, I do not reach the question whether prudential considerations would also bar their suit.

federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 341 (2006) (quoting *Raines* v. *Byrd*, 521 U. S. 811, 818 (1997); internal quotation marks omitted). Unlike the political branches, directly elected by the people, the courts derive their authority under Article III, including the power of judicial review, from "the necessity . . . of carrying out the judicial function of deciding cases." *Cuno*, *supra*, at 340. That is why Article III courts "may exercise power only . . . 'as a necessity,'" that is, only when they are sure they have an actual case before them. *Allen* v. *Wright*, 468 U. S. 737, 752 (1984) (quoting *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 345 (1892)). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Cuno*, *supra*, at 341.

Given the importance of ensuring a court's jurisdiction before deciding the merits of a case, "[w]e have always insisted on strict compliance with th[e] jurisdictional standing requirement." *Raines*, *supra*, at 819. And until today, it has always been clear that a party lacking a direct, personal stake in the litigation could not invoke the power of the federal courts. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 573 (1992) (plaintiff must demonstrate a "concrete private interest in the outcome of [the] suit"); *Lance* v. *Coffman*, 549 U. S. 437, 439 (2007) (*per curiam*) (plaintiff must seek relief that "directly and tangibly benefits *him*" (quoting *Lujan*, *supra*, at 574; emphasis added; internal quotation marks omitted)); *Larson* v. *Valente*, 456 U. S. 228, 244, n. 15 (1982) (Article III requires a litigant to show that a favorable decision "will relieve a discrete injury to *himself*" (emphasis added)); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*" (emphasis added)).

In recent years, we have elaborated the standing requirements of Article III in terms of a three-part test—whether the plaintiff can demonstrate an injury in fact that is fairly traceable to the challenged actions of the defendant and likely to be redressed by a favorable judicial decision. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 102–103 (1998). But regardless of how the test is articulated, "the point has always been the same: whether a plaintiff '*personally* would benefit in a tangible way from the court's intervention.'" *Id.*, at 103, n. 5 (quoting *Warth*, *supra*, at 508; emphasis added). An assignee who has acquired the bare legal right to prosecute a claim but no right to the substantive recovery cannot show that he has a personal stake in the litigation. The Court's decision today is unprecedented. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765 (2000), does not support it. *Vermont Agency*, in recognizing that a *qui tam* relator as assignee of the United States had standing to sue, did not dispense with the essential requirement of Article III standing that the plaintiff have a "concrete private interest in the outcome of [the] suit." *Id.*, at 772 (quoting *Lujan*, *supra*, at 573; internal quotation marks omitted). In *Vermont Agency*, the *qui tam* relator's bounty was sufficient to establish standing because it represented a "partial assignment of the Government's damages claim," encompassing both a legal right to assert the claim *and* a stake in the recovery. 529 U. S., at 773. Thus, it was clear that the False Claims Act gave the "relator himself an interest *in the lawsuit*," in addition to "the right to retain a fee out of the recovery." *Id.*, at 772.

Here, respondents are authorized to bring suit on behalf of the payphone operators, but they have no claim to the recovery. Indeed, their take is not tied to the recovery in any way. Respondents receive their compensation based on the number of payphones and telephone lines operated by their clients, see App. 198, not based on the measure of dam-

ages ultimately awarded by a court or paid by petitioners as part of a settlement. Respondents received the assignments only as a result of their willingness to assume the obligation of remitting any recovery to the assignors, the payphone operators. That is, after all, the entire point of the arrangement. The payphone operators assigned their claims to respondents "for purposes of collection," App. to Pet. for Cert. 114; respondents never had any share in the amount collected. The absence of any right to the substantive recovery means that respondents cannot benefit from the judgment they seek and thus lack Article III standing. "When you got nothing, you got nothing to lose." Bob Dylan, Like A Rolling Stone, on Highway 61 Revisited (Columbia Records 1965).

To be sure, respondents doubtless have more than just a passing interest in the litigation. As collection agencies, respondents must demonstrate that they are willing to make good on their threat to pursue their clients' claims in litigation. Even so, "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont Agency*, *supra*, at 773. The benefit respondents would receive—the general business goodwill that would result from a successful verdict, the ability to collect dial-around compensation for their clients more effectively—is nothing more than a byproduct of the current litigation. Such an interest cannot support their standing to sue in federal court. Cf. *Steel Co.*, *supra*, at 107 (the costs of investigating and prosecuting a substantive claim do not give rise to standing to assert the claim); *Diamond* v. *Charles*, 476 U. S. 54, 70 (1986) (an interest in recovering attorney's fees does not confer standing to litigate the underlying claim).

The undeniable consequence of today's decision is that a plaintiff need no longer demonstrate a personal stake in the outcome of the litigation. Instead, the majority has replaced the personal stake requirement with a completely im-

personal one. The right to sue is now the exact opposite of a personal claim—it is a marketable commodity. By severing the right to recover from the right to prosecute a claim, the Court empowers *anyone* to bring suit on any claim, whether it be the first assignee, the second, the third, or so on. But, as we have said in another context, standing is not "commutative." *Cuno*, 547 U. S., at 352. Legal claims, at least those brought in federal court, are not fungible commodities.

The source of the Court's mistake is easy to identify. The Court goes awry when it asserts that the standing inquiry focuses on whether the *injury* is likely to be redressed, not whether the *complaining party's* injury is likely to be redressed. See *ante*, at 286–287. That could not be more wrong. We have never approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the court. Never. The Court commits this mistake by treating the elements of standing as separate strands rather than as interlocking and related elements meant to ensure a personal stake. Our cases do not condone this approach.

The Court expressly rejected such an argument in *Vermont Agency*, where the relator argued that he was "suing to remedy an injury in fact suffered by the United States." 529 U. S., at 771. We dismissed the argument out of hand, noting that "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*." *Id.*, at 771–772 (quoting *Warth*, 422 U. S., at 499; emphasis in *Vermont Agency*; internal quotation marks omitted). Although the Court's analysis in that section of the opinion concerned the right of the relator to assert the United States' *injury*, the Court treated it as axiomatic that any "redress" must also redound to the benefit of the relator.

In *Steel Co.*, the Court similarly rejected a basis for standing that turned on relief sought—the imposition of civil penalties—that was "payable to the United States Treasury," but not to the plaintiff. 523 U. S., at 106. We observed that

the plaintiff sought "not remediation of its *own* injury," but merely the "vindication of the rule of law." *Ibid.* (emphasis added). Importantly, the Court recognized that "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id.*, at 107. Again, the Court's emphasis on the *party's* injury makes clear that the basis for rejecting standing in *Steel Co.* was the fact that the remedy sought would not benefit the party before the Court.

The majority's view of the Article III redressability requirement is also incompatible with what we said in *Raines*, 521 U. S. 811. In that case, we held that individual Members of Congress lacked standing to contest the constitutionality of the Line Item Veto Act. We observed that the Congressmen "do not claim that they have been deprived of something to which they *personally* are entitled." *Id.*, at 821. Rather, the Members sought to enforce a right that ran to their office, not to their person. "If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds . . . as trustee for his constituents, not as a prerogative of personal power." *Ibid.* We therefore held that the individual Members did "not have a sufficient 'personal stake' in th[e] dispute" to maintain their challenge. *Id.*, at 830. See also *Warth*, *supra*, at 506 (denying standing where "the record is devoid of any indication" that the requested "relief would benefit petitioners"); *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 39, 42 (1976) (denying standing to plaintiffs who did not "stand to profit in some *personal* interest" because it was "purely speculative" whether the relief sought "would result in *these respondents*' receiving the hospital services they desire" (emphasis added)).

The majority finds that respondents have a sufficient stake in this litigation because the substantive recovery will initially go to them, and "[w]hat does it matter what the ag-

gregators do with the money afterward?" *Ante*, at 287. The majority's assertion implies, incorrectly, that respondents have, or ever had, a choice of what to do with the recovery. It may be true that a plaintiff's *independent* decision to pledge his recovery to another, as in respondents' hypothetical of an "*original* owner of a claim who signs a collateral agreement with a charity obligating herself to donate every penny she recovers in [the] litigation," Brief for Respondents 21, would not divest the plaintiff of Article III standing. But respondents never had the right to direct the disposition of the recovery; they have only the right to sue. The hypothetical plaintiff who chooses to pledge her recovery to charity, by contrast, will secure a personal benefit from the recovery. Unlike respondents' claims, the hypothetical plaintiff's pre-existing claim is not tied in any way to her separate agreement to direct her recovery to charity. She has more than the right to sue; she has the right to exercise her independent authority to direct the proceeds as she sees fit. In that situation, the Article III requirement that a plaintiff demonstrate a personal stake in the outcome of the litigation is satisfied.[2]

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[2]The majority believes that the examples of trustees, guardians ad litem, receivers, and executors show that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit." *Ante*, at 287. None of these examples is pertinent to the question here. "A guardian ad litem or next friend . . . is a nominal party only; the ward is the real party in interest . . . ." 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1548, pp. 373–374 (2d ed. 1990). A receiver "is considered to be an officer of the court, and therefore not an agent of the parties, whose appointment is incident to other proceedings in which some form of primary relief is sought." 12 *id.*, § 2981, at 9–10 (2d ed. 1997) (footnote omitted). Trustees hold legal title to the assets in the trust estate and have an independent fiduciary obligation to sue to preserve those assets. The trustee's discharge of its legal obligation is an independent, personal benefit that supports the trustee's standing to sue in federal court. The majority's response that assignees for collection only have a "*contractual* obligation to litigate," *ante*, at 288, is unavailing, because the contractual obligation to sue and remit the proceeds of any recovery was a condition of the assign-

The Court believes that these standing principles, embodying a "core component derived directly from the Constitution," *Allen*, 468 U. S., at 751, that is of "particular importance in ensuring that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society," and that is "crucial in maintaining the tripartite allocation of power set forth in the Constitution," *Cuno*, 547 U. S., at 341 (internal quotation marks omitted), should yield "as a practical matter" to the prospect that a contrary "holding could easily be overcome," *ante*, at 289. The Court chooses to elevate expediency above the strictures imposed by the Constitution. That is a tradeoff the Constitution does not allow. Cf. *Raines*, *supra*, at 820 ("[W]e must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency"). Perhaps it is true that a "dollar or two," *ante*, at 289, would give respondents a sufficient stake in the litigation. Article III is worth a dollar. And in any case, the ease with which respondents can comply with the requirements of Article III is not a reason to abandon our precedents; it is a reason to adhere to them.

II

Given all this, it is understandable that the majority opts to minimize its reliance on modern standing principles and to retreat to a broad, generalized reading of the historical tradition of assignments. But that history does not support the majority's conclusion.

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ment of the claim in the first place. The majority's reasoning is perfectly circular: A suit pursuant to a contract to remit proceeds satisfies Article III because there is a contract to remit proceeds.

In any event, the majority cannot dispute the point that suits by trustees, guardians ad litem, executors, and the like make up a settled, continuous practice "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 102 (1998). As shown below, the same cannot be said for suits by assignees for collection only. See *infra*, at 309–312.

The first problem lies in identifying the relevant tradition. Much of the majority's historical analysis focuses on the generic (and undisputed) point that common law and equity courts eventually permitted assignees to sue on their assigned claims. See *ante*, at 275–279. I would treat that point as settled as much by *stare decisis*, see *Vermont Agency*, 529 U. S., at 773, as by the historic practice of the King's Bench and Chancery. But the general history of assignments says nothing about the particular aspect of suits brought on assigned claims that is relevant to this case: whether an assignee who has acquired the legal right to sue, but no right to any substantive recovery, can maintain an action in court. On that precise question, the historical sources are either nonexistent or equivocal.

A

None of the English common-law sources on which the majority relies establishes that assignments *of this sort* would be permitted either at law or in equity. As the majority's discussion makes clear, both systems permitted suits brought on assignments—either in equity by an assignee having a beneficial interest in the litigation, or at law by an assignee who had a power of attorney and sued in the name of the assignor. See *ante*, at 276–277. But at all times, suits based on assignments remained subject to the prohibition on champerty and maintenance. See 7 W. Holdsworth, History of English Law 535–536 (1926).[3] By the 18th cen-

[3]Blackstone defined maintenance as the "officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it . . . . This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression." 4 W. Blackstone, Commentaries *134–*135. Champerty "is a species of maintenance, . . . being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense." *Id.*, at *135.

tury, an assignment no longer constituted maintenance *per se*, see *id.*, at 536, but it appears to have been an open question whether an assignment of the "[b]are [r]igh[t] to [l]itigate" would fail as "[s]avouring" of champerty and maintenance, see M. Smith, Law of Assignment: The Creation and Transfer of Choses in Action 318, 321 (2007). In order to sustain an assignment of the right to sue, the assignment had to include the transfer of a property interest to which the right of action was incident or subsidiary. *Id.*, at 321–322; see also *Prosser* v. *Edmonds*, 1 Y. & C. Exch. 481, 160 Eng. Rep. 196 (1835); *Dickinson* v. *Burrell*, 35 Beav. 257, 55 Eng. Rep. 894 (1866); 2 J. Story, Commentaries on Equity Jurisprudence § 1040*h*, pp. 234–235 (8th ed. 1861); R. Megarry & P. Baker, Snell's Principles of Equity 82 (25th ed. 1960).

American courts as well understood the common-law rule to require a transfer of interest to the assignee—over and above the "naked right to bring a suit"—that gave the assignee a "valuable right of property." *Trael* v. *Clews*, 115 U. S. 528, 541 (1885). A New York court, surveying the English sources, concluded that "an assignment to the plaintiff of the assignor's right to maintain and prosecute an action for the specific performance of defendants' agreement, amounts to nothing more than an assertion that the assignor has undertaken to assign to the plaintiff a bare right to litigate for the former's benefit exclusively." *Williams* v. *Boyle*, 1 Misc. 364, 367, 20 N. Y. S. 720, 722 (Ct. Common Pleas 1892). To secure standing in a court of equity, the court held, "it must appear that the assignee's successful prosecution of the action is susceptible of *personal* enjoyment *by him* . . . ." *Ibid.* (emphasis added).

So while there is no doubt that at common law, courts of law and equity sought ways of protecting the rights of assignees, they did not do so to the exclusion of the age-long objection to maintenance, which could be found when the assignee lacked a sufficient interest in the subject matter of the litigation. During the common-law period at least, it re-

mained an open question whether an assignee for collection, who by agreement took nothing from the suit, had a sufficient interest in the assigned debt to support his right to sue.

To be sure, the assignments at issue here purport to give respondents "all rights, title and interest" in the payphone operators' claims for dial-around compensation. App. to Pet. for Cert. 114. But when severed from the right to retain any of the substantive recovery, it is not clear that common-law courts of law or equity would have treated the assigned right to litigate as incidental or subsidiary to the interest represented by the claim itself. Cf. 7 Holdsworth, *supra*, at 538 ("[I]t was not till certain classes of rights . . . became more freely assignable in equity, that it became necessary to distinguish between the cases in which assignment was permitted and cases in which it was not; and it is for this reason that we find very little clear authority on these questions till quite modern times").[1]

I do not take the majority's point to be that the common-law tradition supplies the answer to this question. As the majority concedes, it was not until the 19th century that "courts began to consider the specific question presented here." *Ante*, at 279. But even granting this starting point, the Court's recitation of the 19th-century tradition fails to account for the deep divergence in practice regarding the right of assignees with no stake in the substantive recovery to maintain an action in court.

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[1] The fact that a bankrupt assignor could sue at law to recover debts for the benefit of an assignee creditor, see *ante*, at 277 (citing *Winch* v. *Keeley*, 1 T. R. 619, 99 Eng. Rep. 1284 (K. B. 1787)), says nothing about the issue in this case. It is of course true that one has standing to sue when the result of a favorable judgment will be the discharge of a debt or other legal obligation. The only legal obligation respondents seek to discharge is the obligation to remit the proceeds of the litigation to the payphone operators. But as explained above, a party lacking the independent right to direct the disposition of the proceeds cannot demonstrate the personal stake required to invoke the authority of an Article III court. See *supra*, at 304.

The majority concedes that "*some* States during this period of time refused to recognize assignee-for-collection suits," *ante*, at 281, but that refusal was substantially more widespread than the majority acknowledges. See *Robbins* v. *Deverill*, 20 Wis. 142 (1865); *Bostwick* v. *Bryant*, 113 Ind. 448, 16 N. E. 378 (1888); *Moses* v. *Ingram*, 99 Ala. 483, 12 So. 374 (1893); *Brown* v. *Ginn*, 66 Ohio St. 316, 64 N. E. 123 (1902); *Coombs* v. *Harford*, 99 Me. 426, 59 A. 529 (1904); *Martin* v. *Mask*, 158 N. C. 436, 74 S. E. 343 (1912). These courts concluded that assignees having no legal or beneficial interest to vindicate could not sue on the assigned claims.

Several more States, including some enlisted by the majority, only eventually recognized the right of assignees for collection to sue after taking inconsistent positions on the issue. In fact, the rule regarding assignees for collection only was so unsettled that the Kansas Supreme Court reversed itself twice in the span of 19 years. Compare *Krapp* v. *Eldridge*, 33 Kan. 106, 5 P. 372 (1885) (assignees for collection only may sue as the real party in interest), with *Stewart* v. *Price*, 64 Kan. 191, 67 P. 553 (1902) (assignees for collection only may not sue), with *Manley* v. *Park*, 68 Kan. 400, 75 P. 557 (1904) (assignees for collection only may sue again). During this period, many other courts reversed course on the flinty problem posed by assignees for collection only. See *Hoagland* v. *Van Etten*, 23 Neb. 462, 36 N. W. 755 (1888), overruled by *Archer* v. *Musick*, 147 Neb. 1018, 25 N. W. 2d 908 (1947); *State ex rel. Freebourn* v. *Merchants' Credit Serv., Inc.*, 104 Mont. 76, 66 P. 2d 337 (1937), overruled by *Rae* v. *Cameron*, 112 Mont. 159, 114 P. 2d 1060 (1941).

The majority's survey of 19th-century judicial practice thus ignores a substantial contrary tradition during this period. That tradition makes clear that state courts *did not* regularly "entertai[n] suits virtually identical to the litigation before us." *Ante*, at 280. In reality, all that the majority's cases show is that the question whether assignees for collection could maintain an action in court was hotly con-

tested—a live issue that spawned much litigation and diverse published decisions. The confusion was much remarked on by courts of this period, even those that ultimately sided with the Court's understanding of the prevailing practice. See, *e. g.*, *Gomer* v. *Stockdale*, 5 Colo. App. 489, 492, 39 P. 355, 356 (1895) ("There is much controversy in the various states respecting that almost universal code provision, that a suit must be prosecuted in the name of the real party in interest"); *Compton* v. *Atwell*, 207 F. 2d 139, 140–141 (CADC 1953) ("[W]hether an assignee for collection only is the real party in interest . . . has produced a variance of judicial opinion" and "has so divided other courts").

Commentators have also called attention to the divergent practice. As the majority notes, John Norton Pomeroy observed that "there is some conflict" on the question whether an assignee for collection obligated to "account for the whole proceeds . . . is entitled to sue in his own name." Remedies and Remedial Rights § 132, p. 159 (1876) (internal quotation marks omitted). See also Comment, The Real Party in Interest Rule Revitalized: Recognizing Defendant's Interest in the Determination of Proper Parties Plaintiff, 55 Cal. L. Rev. 1452, 1475 (1967) ("Nowhere do the courts manifest more confusion than in deciding whether an assignee for collection only is a real party in interest"); Note, 51 Mich. L. Rev. 587, 588 (1953) (observing that "[t]here is, however, little agreement among the courts as to the meaning and purpose of [real party in interest] provisions" and noting that they have been construed "to prevent the owner of the bare legal title to a chose in action from suing"). Indeed, notable legal commentators of the period argued against permitting suits by assignees for collection. See, *e. g.*, 1 J. Kerr, Law of Pleading and Practice § 586, pp. 791–792 (1919) ("[T]he party in whom the legal interest is vested is not always the real party in interest. 'The real party in interest' is the party who would be benefited or injured by the judgment in the cause. . . . The rule should be restricted to parties whose interests are in issue, and are to be affected by the decree").

This unsettled and conflicting state of affairs is understandable given the transformation in the understanding of the common-law prohibition on suits by assignees with no beneficial interest. The immediate cause for this transformation was the merger of law and equity, and the creation of real party in interest provisions intended to reconcile the two forms of actions. *Allen* v. *Brown*, 44 N. Y. 228, 231 (1870) (noting that New York code provision allowing assignees to sue as the real party in interest "abolishe[d] the distinction between actions at law and suits in equity"); see *ante*, at 279. The fusion of law and equity forced courts to confront the novel question of what to do with assignees for collection only, who could not sue at law in their own name, and who could not recover on a bill in equity for the lack of any beneficial interest to enforce. Were such assignees, under the new system, real parties in interest who could bring suit? It is not surprising that courts took conflicting positions on this question, a question for which the historical tradition did not provide an answer. Given this, it is difficult to characterize a practice as showing what sort of cases and controversies were "*traditionally* amenable to . . . the judicial process," *Steel Co.*, 523 U. S., at 102 (emphasis added), when the practice was a self-conscious *break* in tradition.

In *Vermont Agency*, by contrast, the Court relied on a long and unbroken tradition of informer statutes that reached back to the 14th century and prevailed up to the "period immediately before and after the framing of the Constitution." 529 U. S., at 776. The Court noted that the American Colonies "pass[ed] several informer statutes expressly authorizing *qui tam* suits," and that the First Congress itself "enacted a considerable number of informer statutes." *Ibid.* This tradition provided relevant evidence of what the Framers in 1787 would have understood the terms "case" and "controversy" to mean. See *Coleman* v. *Miller*, 307 U. S. 433, 460 (1939) (opinion of Frankfurter, J.) (the Article III "[j]udicial power could come into play only in matters that were the traditional concern of the courts at West-

minster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'").[5]

There is certainly no comparable tradition here. The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of Article III. Although we have sometimes looked to cases postdating the founding era as evidence of common-law traditions, we have never done so when the courts self-consciously confronted novel questions arising from a break in the received tradition, or where the practice of later courts was so divergent. A belated and equivocal tradition cannot fill in for the fundamental requirements of Article III where, as here, those requirements are so plainly lacking.

B

Nor do our own cases establish that we "long ago indicated that assignees for collection only can properly bring suit." *Ante*, at 283. (If the majority truly believed that, one would expect the cases to be placed front and center in the Court's analysis, rather than as an afterthought.) None addressed the requirements of Article III, and so none constitutes binding precedent. See *Steel Co.*, *supra*, at 91 ("[D]rive-by jurisdictional rulings of this sort . . . have no precedential effect"); *Lewis* v. *Casey*, 518 U. S. 343, 352, n. 2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect").

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[5]The statutes from the American Colonies add nothing to the majority's historical argument. See *ante*, at 278–279. Exceptions (some created by statute) to the general rule against assignments at law arose early in the common-law period, including exceptions for executors and administrators of estates, assignees in bankruptcy, negotiable instruments, and assignments involving the sovereign. See 29 R. Lord, Williston on Contracts § 74:2, pp. 214–215 (4th ed. 2003). What none of these exceptions provides for, however, are suits brought by assignees for collection only—*i. e.*, assignees who have no share in the substantive recovery. Such assignees, as the majority acknowledges, did not attract the attention of courts until the 19th century. See *ante*, at 279.

In *Waite* v. *Santa Cruz*, 184 U. S. 302 (1902), we addressed the then-existing statutory provision that barred jurisdiction over suits "improperly or collusively made or joined . . . for the purpose of creating a case cognizable or removable under this act." *Id.*, at 325. We held that a plaintiff who took legal title of multiple bonds "for purposes of collection" could not satisfy the statute when the bonds individually did not meet the amount in controversy requirement. *Ibid.* The Court did not say that the "suit *could* properly be brought in federal court," *ante*, at 283, if the only objection was the limitation placed on the plaintiff's assignment; instead, the Court remarked that such a limited assignment would not violate the *statutory* prohibition on suits that are "improperly or collusively made or joined," *Waite*, *supra*, at 325.

In *Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117 (1920), the plaintiff, secretary of the Cattle Raisers' Association, sued to enforce an order of reparations issued by the Interstate Commerce Commission, which found that the defendant railroads had charged excessive shipping rates to the members of the association. The question before the Court was the validity of the lower court's ruling that the assignments to the plaintiff—which reserved a beneficial interest in the assignors, the individual members of the association—did not vest legal title in the secretary "so as [to] authorize the Commission to make the award of damages in his name." *Id.*, at 134. We concluded that the agency was authorized to issue the reparations order in the name of the plaintiff because the assignments were "absolute in form." *Ibid.* We then concluded that "beneficial or equitable title" was not necessary for the plaintiff "to claim an award of reparation" and enforce that award in his own name in court. *Ibid.* In other words, the Court addressed merely the question whether it was appropriate for a federal agency (not bound by the constraints of Article III) to enter an award in the plaintiff's name. In no way did the Court endorse the right

of an assignee for collection to sue as an initial matter in federal court.

Nor did the Court address Article III standing requirements in *Titus* v. *Wallick*, 306 U. S. 282 (1939). There, we found that an assignment "for purposes of suit," where the assignee had an obligation to account for the proceeds (in part) to another, did not render the assignment invalid under New York *state law*. *Id.*, at 289. Thus, we held that the Ohio courts had failed to give full faith and credit to an earlier, valid New York court judgment. *Id.*, at 292. If we had been presented with the Article III question, we would likely have found it significant that the plaintiff-assignee stood to take the balance of any recovery after the proceeds were used to discharge the debts of the assignor (plaintiff's brother) and the plaintiff's wife. *Id.*, at 286. But in any event, the Court's conclusion that the assignment was valid under New York law, where the restrictions of Article III do not operate, does not support the view that suits by assignees for collection are permissible in federal courts.

C

When we have looked to history to confirm our own Article III jurisdiction, we have relied on a firmly entrenched historical tradition that served to confirm the application of modern standing principles. See *Vermont Agency*, 529 U. S., at 774–778. The Court's decision today illustrates the converse approach. It relies on an equivocal and contradictory tradition to override the clear application of the case-or-controversy requirement that would otherwise bar respondents' suit.

But perhaps we should heed the counsels of hope rather than despair. The majority, after all, purports to comply with our Article III precedents, see *ante*, at 285–287, so those precedents at least live to give meaning to "the judiciary's proper role in our system of government" another day, *Raines*, 521 U. S., at 818 (internal quotation marks omitted).

What is more, the majority expressly and repeatedly grounds its finding of standing on its conclusion that "history and precedent are clear" that these types of suits "have long been permitted," *ante*, at 275, and that there is "a strong tradition" of such suits "during the past two centuries," *ante*, at 285, 288. This conclusion is, for the reasons we have set forth, achingly wrong—but at least the articulated test is clear and daunting.

Finally, there is the majority's point that all this fuss could have been avoided for a dollar, see *ante*, at 289—a price, by this point, that most readers would probably be happy to contribute. The price will be higher in future standing cases. And when it is—when standing really matters—it would be surprising if the Court were to look to a case in which it did not.

I would vacate the decision of the Court of Appeals and remand for further proceedings.

Syllabus

PLAINS COMMERCE BANK *v.* LONG FAMILY LAND & CATTLE CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 07–411. Argued April 14, 2008—Decided June 25, 2008

Petitioner Plains Commerce Bank (Bank), a non-Indian bank, sold land it owned in fee simple on a tribal reservation to non-Indians. Respondents the Longs, an Indian couple who had been leasing the land with an option to purchase, claim the Bank discriminated against them by selling the parcel to nonmembers of the Tribe on terms more favorable than the Bank offered to sell it to them. The couple sued in Tribal Court, asserting, *inter alia*, discrimination, breach-of-contract, and bad-faith claims. Over the Bank's objection, the Tribal Court concluded that it had jurisdiction and proceeded to trial, where a jury ruled against the Bank on three claims, including the discrimination claim. The court awarded the Longs damages plus interest. In a supplemental judgment, the court also gave the Longs an option to purchase that portion of the fee land they still occupied, nullifying the Bank's sale of the land to non-Indians. After the Tribal Court of Appeals affirmed, the Bank filed suit in Federal District Court, contending that the tribal judgment was null and void because, as relevant here, the Tribal Court lacked jurisdiction over the Longs' discrimination claim. The District Court granted the Longs summary judgment, finding tribal court jurisdiction proper because the Bank's consensual relationship with the Longs and their company (also a respondent here) brought the Bank within the first category of tribal civil jurisdiction over nonmembers outlined in *Montana* v. *United States*, 450 U. S. 544. The Eighth Circuit affirmed, concluding that the Tribe had authority to regulate the business conduct of persons voluntarily dealing with tribal members, including a nonmember's sale of fee land.

Held:

1. The Bank has Article III standing to pursue this challenge. Both with respect to damages and the option to purchase, the Bank was "injured in fact," see *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560, by the Tribal Court's exercise of jurisdiction over the discrimination claim. This Court is unpersuaded by the Longs' claim that the damages award was premised entirely on their breach-of-contract verdict, which the Bank has not challenged, rather than on their discrimination claim. Because the verdict form allowed the jury to make a damages award after

finding liability as to *any* of the individual claims, the jury could have based its damages award, in whole or in part, on the discrimination finding. The Bank was also injured by the option to purchase. Only the Longs' discrimination claim sought deed to the land as relief. The fact that the remedial purchase option applied only to a portion of the total parcel does not eliminate the injury to the Bank, which had no obligation to sell any of the land to the Longs before the Tribal Court's judgment. That judgment effectively nullified a portion of the sale to a third party. These injuries can be remedied by a ruling that the Tribal Court lacked jurisdiction and that its judgment on the discrimination claim is null and void. Pp. 324–327.

2. The Tribal Court did not have jurisdiction to adjudicate a discrimination claim concerning the non-Indian Bank's sale of its fee land. Pp. 327–342.

(a) The general rule that tribes do not possess authority over non-Indians who come within their borders, *Montana* v. *United States*, *supra*, at 565, restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians, *Strate* v. *A–1 Contractors*, 520 U. S. 438, 446. Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. See *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 267–268. Moreover, when the tribe or its members convey fee land to third parties, the tribe "loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota* v. *Bourland*, 508 U. S. 679, 689. Thus, "the tribe has no authority itself . . . to regulate the use of fee land." *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 430. *Montana* provides two exceptions under which tribes may exercise "civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," 450 U. S., at 565: (1) "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *ibid.*; and (2) a tribe may exercise "civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *id.*, at 566. Neither exception authorizes tribal courts to exercise jurisdiction over the Longs' discrimination claim. Pp. 327–330.

(b) The Tribal Court lacks jurisdiction to hear that claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land, and "a tribe's adjudicative jurisdiction does not exceed its legisla-

tive jurisdiction," *Strate*, *supra*, at 453. *Montana* does not permit tribes to regulate the sale of non-Indian fee land. Rather, it permits tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. 450 U. S., at 564–565. With only one exception, see *Brendale*, *supra*, this Court has never "upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land," *Nevada* v. *Hicks*, 533 U. S. 353, 360. Nor has the Court found that *Montana* authorized a tribe to regulate the sale of such land. This makes good sense, given the limited nature of tribal sovereignty and the liberty interests of nonmembers. Tribal sovereign interests are confined to managing tribal land, see *Worcester* v. *Georgia*, 6 Pet. 515, 561, protecting tribal self-government, and controlling internal relations, see *Montana*, *supra*, at 564. Regulations approved under *Montana* all flow from these limited interests. See, *e. g.*, *Duro* v. *Reina*, 495 U. S. 676, 696. None of these interests justified tribal regulation of a nonmember's sale of fee land. The Tribe cannot justify regulation of the sale of non-Indian fee land by reference to its power to superintend tribal land because non-Indian fee parcels have ceased to be tribal land. Nor can regulation of fee land sales be justified by the Tribe's interest in protecting internal relations and self-government. Any direct harm sustained because of a fee land sale is sustained at the point the land passes from Indian to non-Indian hands. Resale, by itself, causes no additional damage. Regulating fee land sales also runs the risk of subjecting nonmembers to tribal regulatory authority without their consent. Because the Bill of Rights does not apply to tribes and because nonmembers have no say in the laws and regulations governing tribal territory, tribal laws and regulations may be applied only to nonmembers who have consented to tribal authority, expressly or by action. Even then the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve self-government, or control internal relations. There is no reason the Bank should have anticipated that its general business dealings with the Longs would permit the Tribe to regulate the Bank's sale of land it owned in fee simple. The Longs' attempt to salvage their position by arguing that the discrimination claim should be read to challenge the Bank's whole course of commercial dealings with them is unavailing. Their breach-of-contract and bad-faith claims involve the Bank's general dealings; the discrimination claim does not. The discrimination claim is tied specifically to the fee land sale. And only the discrimination claim is before the Court. Pp. 330–340.

(c) Because the second *Montana* exception stems from the same sovereign interests giving rise to the first, it is also inapplicable here.

Syllabus

The "conduct" covered by that exception must do more than injure a tribe; it must "imperil the subsistence" of the tribal community. *Montana*, 450 U. S., at 566. The land at issue has been owned by a non-Indian party for at least 50 years. Its resale to another non-Indian hardly "imperil[s] the subsistence or welfare of the tribe." *Ibid.* Pp. 340–341.

(d) Contrary to the Longs' argument, when the Bank sought the Tribal Court's aid in serving process on the Longs for the Bank's pending state-court eviction action, the Bank did not consent to tribal court jurisdiction over the discrimination claim. The Bank has consistently contended that the Tribal Court lacked jurisdiction. Pp. 341–342.

491 F. 3d 878, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined, and in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined as to Part II. GINSBURG, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 342.

Paul A. Banker argued the cause for petitioner. With him on the briefs were *Robert V. Atmore* and *David A. Von Wald*.

David C. Frederick argued the cause for respondents. With him on the brief were *Richard A. Guest*, *Melody L. McCoy*, *James P. Hurley*, *Michael F. Sturley*, and *Lynn E. Blais*.

Curtis E. Gannon argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were former *Solicitor General Clement*, *Assistant Attorney General Tenpas*, *Deputy Solicitor General Kneedler*, *David C. Shilton*, *William B. Lazarus*, and *Amber B. Blaha*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by *Lawrence G. Wasden*, Attorney General of Idaho, and *Clay R. Smith*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Talis J. Colberg* of Alaska, *Bill McCollum* of Florida, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Larry Long* of South Dakota, *Mark L. Shurtleff* of Utah, *Robert M. McKenna* of Washington, and *J. B. Van Hollen* of Wisconsin; for

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals. Following the sale, an Indian couple, customers of the bank who had defaulted on their loans, claimed the bank discriminated against them by offering the land to non-Indians on terms more favorable than those the bank offered to them. The couple sued on that claim in Tribal Court; the bank contested the court's jurisdiction. The Tribal Court concluded that it had jurisdiction and proceeded to hear the case. It ultimately ruled against the bank and awarded the Indian couple damages and the right to purchase a portion of the fee land. The question presented is whether the Tribal Court had jurisdiction to adjudicate a discrimination claim concerning the non-Indian bank's sale of fee land it owned. We hold that it did not.

I

The Long Family Land and Cattle Company, Inc. (Long Company or Company), is a family-run ranching and farming operation incorporated under the laws of South Dakota. Its lands are located on the Cheyenne River Sioux Indian Reservation. Once a massive, 60-million acre affair, the reserva-

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Idaho County, Idaho, et al. by *Scott Gregory Knudson*, *Tom D. Tobin*, and *Kimron Torgerson*; for the American Bankers Association et al. by *Brett Koenecke* and *Timothy M. Engel*; for the Association of American Railroads by *Lynn H. Slade*, *Walter E. Stern III*, and *Daniel Saphire*; and for the Mountain States Legal Foundation by *J. Scott Detamore* and *William Perry Pendley*.

Briefs of *amici curiae* urging affirmance were filed for the Cheyenne River Sioux Tribe by *Mark I. Levy*, *Keith M. Harper*, *Thomas J. Van Norman*, and *Roger K. Heidenreich*; for the National American Indian Court Judges Association et al. by *William R. Stein*, *Roberta Koss*, *Steven Paul McSloy*, *Jill E. Tompkins*, and *Rob Roy Smith*; for the National Congress of American Indians et al. by *Carter G. Phillips*, *Virginia A. Seitz*, and *Rigaz A. Kanji*; and for the National Network to End Domestic Violence et al. by *Fernando R. Laguarda* and *Timothy J. Simeone*.

tion was appreciably diminished by Congress in the 1880's and at present consists of roughly 11 million acres located in Dewey and Ziebach Counties in north-central South Dakota. The Long Company is a respondent here, along with Ronnie and Lila Long, husband and wife, who together own at least 51 percent of the Company's shares. Ronnie and Lila Long are both enrolled members of the Cheyenne River Sioux Indian Tribe.

The Longs and their Company have been customers for many years at Plains Commerce Bank (Bank), located some 25 miles off the reservation as the crow flies in Hoven, South Dakota. The Bank, like the Long Company, is a South Dakota corporation, but has no ties to the reservation other than its business dealings with tribal members. The Bank made its first commercial loan to the Long Company in 1989, and a series of agreements followed. As part of those agreements, Kenneth Long—Ronnie Long's father and a non-Indian—mortgaged to the Bank 2,230 acres of fee land he owned inside the reservation. At the time of Kenneth Long's death in the summer of 1995, Kenneth and the Long Company owed the Bank $750,000.

In the spring of 1996, Ronnie and Lila Long began negotiating a new loan contract with the Bank in an effort to shore up their Company's flagging financial fortunes and come to terms with their outstanding debts. After several months of back-and-forth, the parties finally reached an agreement in December of that year—two agreements, to be precise. The Company and the Bank signed a fresh loan contract, according to which Kenneth Long's estate deeded over the previously mortgaged fee acreage to the Bank in lieu of foreclosure. App. 104. In return, the Bank agreed to cancel some of the Company's debt and to make additional operating loans. The parties also agreed to a lease arrangement: The Company received a two-year lease on the 2,230 acres, deeded over to the Bank, with an option to purchase the land at the end of the term for $468,000. *Id.*, at 96–103.

It is at this point, the Longs claim, that the Bank began treating them badly. The Longs say the Bank initially offered more favorable purchase terms in the lease agreement, allegedly proposing to sell the land back to the Longs with a 20-year contract for deed. The Bank eventually rescinded that offer, the Longs claim, citing "'possible jurisdictional problems'" that might have been caused by the Bank financing an "'Indian owned entity on the reservation.'" 491 F. 3d 878, 882 (CA8 2007) (case below).

Then came the punishing winter of 1996–1997. The Longs lost over 500 head of cattle in the blizzards that season, with the result that the Long Company was unable to exercise its option to purchase the leased acreage when the lease contract expired in 1998. Nevertheless, the Longs refused to vacate the property, prompting the Bank to initiate eviction proceedings in state court and to petition the Cheyenne River Sioux Tribal Court to serve the Longs with a notice to quit. In the meantime, the Bank sold 320 acres of the fee land it owned to a non-Indian couple. In June 1999, while the Longs continued to occupy a 960-acre parcel of the land, the Bank sold the remaining 1,910 acres to two other nonmembers.

In July 1999, the Longs and the Long Company filed suit against the Bank in the Tribal Court, seeking an injunction to prevent their eviction from the property and to reverse the sale of the land. They asserted a variety of claims, including breach of contract, bad faith, violation of tribal-law self-help remedies, and discrimination. The discrimination claim alleged that the Bank sold the land to nonmembers on terms more favorable than those offered the Company. The Bank asserted in its answer that the court lacked jurisdiction and also stated a counterclaim. The Tribal Court found that it had jurisdiction, denied the Bank's motion for summary judgment on its counterclaim, and proceeded to trial. Four causes of action were submitted to the seven-member jury:

breach of contract, bad faith, violation of self-help remedies, and discrimination.

The jury found for the Longs on three of the four causes, including the discrimination claim, and awarded a $750,000 general verdict. After denying the Bank's post-trial motion for judgment notwithstanding the verdict by finding again that it had jurisdiction to adjudicate the Longs' claims, the Tribal Court entered judgment awarding the Longs $750,000 plus interest. A later supplemental judgment further awarded the Longs an option to purchase the 960 acres of the land they still occupied on the terms offered in the original purchase option, effectively nullifying the Bank's previous sale of that land to non-Indians.

The Bank appealed to the Cheyenne River Sioux Tribal Court of Appeals, which affirmed the judgment of the trial court. The Bank then filed the instant action in the United States District Court for the District of South Dakota, seeking a declaration that the tribal judgment was null and void because, as relevant here, the Tribal Court lacked jurisdiction over the Longs' discrimination claim. The District Court granted summary judgment to the Longs. The court found tribal court jurisdiction proper because the Bank had entered into a consensual relationship with the Longs and the Long Company. 440 F. Supp. 2d 1070, 1077–1078, 1080–1081 (2006). According to the District Court, this relationship brought the Bank within the first category of tribal civil jurisdiction over nonmembers outlined in *Montana* v. *United States*, 450 U. S. 544 (1981). See 440 F. Supp. 2d, at 1077–1078.

The Court of Appeals for the Eighth Circuit affirmed. 491 F. 3d 878. The Longs' discrimination claim, the court held, "arose directly from their preexisting commercial relationship with the bank." *Id.*, at 887. When the Bank chose to deal with the Longs, it effectively consented to substantive regulation by the Tribe: An antidiscrimination tort claim

was just another way of regulating the commercial transactions between the parties. See *ibid.* In sum, the Tribe had authority to regulate the business conduct of persons who "voluntarily deal with tribal members," including, here, a nonmember's sale of fee land. *Ibid.*

We granted certiorari, 552 U. S. 1087 (2008), and now reverse.

II

Before considering the Tribal Court's authority to adjudicate the discrimination claim, we must first address the Longs' contention that the Bank lacks standing to raise this jurisdictional challenge in the first place. Though the Longs raised their standing argument for the first time before this Court, we bear an independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94–95 (1998).

We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question. See *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U. S. 9, 15 (1987); *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, 852–853 (1985). If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void. The Longs do not contest this settled principle but argue instead that the Bank has suffered no "injury in fact" as required by Article III's case-or-controversy provision. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

The Longs appear to recognize their argument is somewhat counterintuitive. They concede the jury found the Bank guilty of discrimination and awarded them $750,000 plus interest. But the Longs contend the jury's damages award was in fact premised entirely on their breach-of-contract rather than on their discrimination claim. The Bank does not presently challenge the breach-of-contract verdict.

In support of their argument, the Longs point to their amended complaint in the Tribal Court. The complaint comprised nine counts. Several of the counts sought damages; the discrimination count did not. As relief for the discrimination claim, the Longs asked to be granted "possession and title to their land." App. 173. The Longs contend that the damages award therefore had nothing to do with the discrimination claim. As a result, a decision from this Court finding no jurisdiction with respect to that claim—the only claim the Bank appeals—would not change anything.

We are not persuaded. The jury verdict form consisted of six special interrogatories, covering each claim asserted against the Bank, with another one covering the amount of damages to be awarded. *Id.*, at 190–192. The damages interrogatory specifically allowed the jury to make an award after finding liability as to *any* of the individual claims: "If you answered yes to Numbers 1, 3, 4, *or* 5 what amount of damages should be awarded to the Plaintiffs?" *Id.*, at 192 (emphasis added). The jury found against the Bank on three of the special interrogatories, including number 4, the discrimination claim. The Bank, the jurors found, "intentionally discriminate[d] against the Plaintiffs Ronnie and Lila Long." *Id.*, at 191. The jury then entered an award of $750,000. *Id.*, at 192. These facts establish that the jury could have based its damages award, in whole or in part, on the finding of discrimination.

There is, in addition, the option to purchase. The Longs argue that requiring the Bank to void the sale to nonmembers of a 960-acre parcel and sell that parcel to them instead does not constitute injury in fact, because the Tribal Court actually *denied* the relief the Longs sought for the Bank's discrimination. In its supplemental judgment, the Tribal Court refused to permit the Longs (or the Long Company) to purchase all the land—as they had requested—instead granting an option to purchase only the 960 acres the Longs occupied at the time. See Supplemental Judgment in

No. R–120–99, *Long Family Land & Cattle Co.* v. *Maciejewski* (Feb. 18, 2003), App. to Pet. for Cert. A–69 to A–70. Even this partial relief, the Longs insist, was crafted as an equitable remedy for their breach-of-contract claim, see Brief for Respondents 32–34, and in any event the Bank really suffered no harm, because it would gain as much income selling to the Longs as it did selling to the nonmembers, see *id.*, at 34–35.

These arguments do not defeat the Bank's standing. The Longs requested, as a remedy for the alleged discrimination, "possession and title" to the subject land. App. 173. They received an option to acquire a portion of exactly that. See App. to Pet. for Cert. A–69 to A–70. The Tribal Court's silence in its supplemental judgment as to which claim, exactly, the option to purchase was meant to remedy is immaterial. See *ibid.* Of the four claims presented to the jury, only the discrimination claim sought deed to the land as relief. See Amended Complaint (Jan. 3, 2000), App. 158, 173. Nor does the fact that the remedial purchase option applied only to a portion of the total parcel eliminate the Bank's injury. The Bank had no obligation to sell the land to the Longs before the Tribal Court's judgment—indeed, the Bank had already sold the acreage to third parties. The Tribal Court judgment effectively nullified a portion of that sale. This judicially imposed burden certainly qualifies as an injury for standing purposes. As for the Longs' speculation that the Bank would make as much money selling the land to them as it did selling the parcel to nonmembers, the argument is entirely beside the point. There is more than adequate injury in being compelled to undo one deed and enter into another—particularly with individuals who had previously defaulted on loans.

Both with respect to damages and the option to purchase, the Bank was injured by the Tribal Court's exercise of jurisdiction over the discrimination claim. Those injuries can be remedied by a ruling in favor of the Bank that the Tribal

Court lacked jurisdiction and that its judgment on the discrimination claim is null and void. The ultimate collateral consequence of such a determination, whatever it may be—vacatur of the general damages award, vacatur of the option to purchase, a new trial on the other claims—does not alter the fact that the Bank has shown injury traceable to the challenged action and likely to be redressed by a favorable ruling. *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). The Bank has Article III standing to pursue this challenge.

III

A

For nearly two centuries now, we have recognized Indian tribes as "distinct, independent political communities," *Worcester* v. *Georgia*, 6 Pet. 515, 559 (1832), qualified to exercise many of the powers and prerogatives of self-government, see *United States* v. *Wheeler*, 435 U. S. 313, 322–323 (1978). We have frequently noted, however, that the "sovereignty that the Indian tribes retain is of a unique and limited character." *Id.*, at 323. It centers on the land held by the tribe and on tribal members within the reservation. See *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975) (tribes retain authority to govern "both their members and their territory," subject ultimately to Congress); see also *Nevada* v. *Hicks*, 533 U. S. 353, 392 (2001) (O'Connor, J., concurring in part and concurring in judgment) ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe").

As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, see *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U. S. 195, 201 (1985), to determine tribal membership, see *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 55 (1978), and to regulate domestic relations among members, see *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.*, 424 U. S. 382, 387–389 (1976) (*per curiam*). They

may also exclude outsiders from entering tribal land. See *Duro* v. *Reina*, 495 U. S. 676, 696–697 (1990). But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: "[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U. S., at 565. As we explained in *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191 (1978), the tribes have, by virtue of their incorporation into the American republic, lost "the right of governing . . . person[s] within their limits except themselves." *Id.*, at 209 (emphasis deleted; internal quotation marks omitted).

This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called "non-Indian fee land." *Strate* v. *A–1 Contractors*, 520 U. S. 438, 446 (1997) (internal quotation marks omitted). Thanks to the Indian General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. §331 *et seq.*, there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes. See *Atkinson Trading Co.* v. *Shirley*, 532 U. S. 645, 648, 650, n. 1 (2001). The history of the General Allotment Act and its successor statutes has been well rehearsed in our precedents. See, *e. g.*, *Montana*, *supra*, at 558–563; *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 254–255 (1992). Suffice it to say here that the effect of the Act was to convert millions of acres of formerly tribal land into fee simple parcels, "fully alienable," *id.*, at 264, and "free of all charge or incumbrance whatsoever," 25 U. S. C. §348 (2000 ed., Supp. V). See F. Cohen, Handbook of Federal Indian Law §16.03[2][b], pp. 1041–1042 (2005 ed.) (hereinafter Cohen).

Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. See *County of Yakima*, *supra*, at 267–268 (General Allotment Act permits Yakima County to impose ad valorem

tax on fee land located within the reservation); *Goudy* v. *Meath*, 203 U. S. 146, 149–150 (1906) (by rendering allotted lands alienable, General Allotment Act exposed them to state assessment and forced sale for taxes); *In re Heff*, 197 U. S. 488, 502–503 (1905) (fee land subject to plenary state jurisdiction upon issuance of trust patent (superseded by the Burke Act, 34 Stat. 182, 25 U. S. C. §349 (2000 ed.))). Among the powers lost is the authority to prevent the land's sale, see *County of Yakima*, *supra*, at 263 (General Allotment Act granted fee holders power of voluntary sale)—not surprisingly, as "free alienability" by the holder is a core attribute of the fee simple, C. Moynihan, Introduction to Law of Real Property §3, p. 32 (2d ed. 1988). Moreover, when the tribe or tribal members convey a parcel of fee land "*to non-Indians*, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota* v. *Bourland*, 508 U. S. 679, 689 (1993) (emphasis added). This necessarily entails "the loss of regulatory jurisdiction over the use of the land by others." *Ibid.* As a general rule, then, "the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 430 (1989) (opinion of White, J.).

We have recognized two exceptions to this principle, circumstances in which tribes may exercise "civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana*, 450 U. S., at 565. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Ibid.* Second, a tribe may exercise "civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare

of the tribe." *Id.*, at 566. These rules have become known as the *Montana* exceptions, after the case that elaborated them. By their terms, the exceptions concern regulation of "the *activities* of nonmembers" or "the *conduct* of non-Indians on fee land."

Given *Montana*'s "'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,'" *Atkinson*, *supra*, at 651 (quoting *Montana*, *supra*, at 565), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid," *Atkinson*, *supra*, at 659. The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Atkinson*, 532 U. S., at 654. These exceptions are "limited" ones, *id.*, at 647, and cannot be construed in a manner that would "swallow the rule," *id.*, at 655, or "severely shrink" it, *Strate*, 520 U. S., at 458. The Bank contends that neither exception authorizes tribal courts to exercise jurisdiction over the Longs' discrimination claim at issue in this case. We agree.

B

According to our precedents, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.*, at 453. We reaffirm that principle today and hold that the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land.

The Longs' discrimination claim challenges a non-Indian's sale of non-Indian fee land. Despite the Longs' attempt to recharacterize their claim as turning on the Bank's alleged "failure to pay to respondents loans promised for cattle-raising on tribal trust land," Brief for Respondents 47, in fact the Longs brought their discrimination claim "seeking to have the land sales set aside on the ground that the sale to nonmembers 'on terms more favorable' than the bank had

extended to the Longs" violated tribal tort law, 491 F. 3d, at 882 (quoting Plaintiffs' Amended Complaint, App. 173). See also Brief for United States as *Amicus Curiae* 7. That discrimination claim thus concerned the sale of a 2,230-acre fee parcel that the Bank had acquired from the estate of a non-Indian.

The status of the land is relevant "insofar as it bears on the application of . . . *Montana*'s exceptions to [this] case." *Hicks*, 533 U. S., at 376 (SOUTER, J., concurring). The acres at issue here were alienated from the Cheyenne River Sioux's tribal trust and converted into fee simple parcels as part of the Act of May 27, 1908, 35 Stat. 312, commonly called the 1908 Allotment Act. See Brief for Respondents 4, n. 2. While the General Allotment Act provided for the division of tribal land into fee simple parcels owned by individual tribal members, that Act also mandated that such allotments would be held in trust for their owners by the United States for a period of 25 years—or longer, at the President's discretion—during which time the parcel owners had no authority to sell or convey the land. See 25 U. S. C. §348 (2000 ed., and Supp. V). The 1908 Act released particular Indian owners from these restrictions ahead of schedule, vesting in them full fee ownership. See §1, 35 Stat. 312. In 1934, Congress passed the Indian Reorganization Act, 48 Stat. 984, 25 U. S. C. §461 *et seq.*, which "pu[t] an end to further allotment of reservation land," but did not "return allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs, and assigns." *County of Yakima*, 502 U. S., at 264.

The tribal tort law the Longs are attempting to enforce, however, operates as a restraint on alienation. It "set[s] limits on how nonmembers may engage in commercial transactions," 491 F. 3d, at 887—and not just any transactions, but specifically nonmembers' sale of fee lands they own. It regulates the substantive terms on which the Bank is able to offer its fee land for sale. Respondents and their principal

amicus, the United States, acknowledge that the tribal tort at issue here is a form of regulation. See Brief for Respondents 52; Brief for United States as *Amicus Curiae* 25–26; see also *Riegel* v. *Medtronic, Inc.*, 552 U. S. 312, 324 (2008). They argue the regulation is fully authorized by the first *Montana* exception. They are mistaken.

Montana does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the "activities of nonmembers," 450 U. S., at 565, allowing these to be regulated to the extent necessary "to protect tribal self-government [and] to control internal relations," *id.*, at 564. See *Big Horn Cty. Elec. Cooperative, Inc.* v. *Adams*, 219 F. 3d 944, 951 (CA9 2000) ("*Montana* does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of the *activities* of nonmembers" (internal quotation marks omitted; emphasis added)).

We cited four cases in explanation of *Montana*'s first exception. Each involved regulation of non-Indian activities on the reservation that had a discernible effect on the tribe or its members. The first concerned a Tribal Court's jurisdiction over a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation. See *Williams* v. *Lee*, 358 U. S. 217 (1959). The other three involved taxes on economic activity by nonmembers. See *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 152–153 (1980) (in cases where "the tribe has a significant interest in the subject matter," tribes retain "authority to tax the activities or property of non-Indians taking place or situated on Indian lands"); *Morris* v. *Hitchcock*, 194 U. S. 384, 393 (1904) (upholding tribal taxes on nonmembers grazing cattle on Indian-owned fee land within tribal territory); *Buster* v. *Wright*, 135 F. 947, 950 (CA8 1905)

(Creek Nation possessed power to levy a permit tax on nonmembers for the privilege of doing business within the reservation).

Our cases since *Montana* have followed the same pattern, permitting regulation of certain forms of nonmember conduct on tribal land. We have upheld as within the tribe's sovereign authority the imposition of a severance tax on natural resources removed by nonmembers from tribal land. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982). We have approved tribal taxes imposed on leasehold interests held in tribal lands, as well as sales taxes imposed on nonmember businesses within the reservation. See *Kerr-McGee*, 471 U. S., at 196–197. We have similarly approved licensing requirements for hunting and fishing on tribal land. See *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 337 (1983).

Tellingly, with only "one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*." *Hicks*, *supra*, at 360 (emphasis added). See *Atkinson*, 532 U. S., at 659 (Tribe may not tax nonmember activity on non-Indian fee land); *Strate*, 520 U. S., at 454, 457 (tribal court lacks jurisdiction over tort suit involving an accident on nontribal land); *Montana*, *supra*, at 566 (Tribe has no authority to regulate nonmember hunting and fishing on non-Indian fee land). The exception is *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, and even it fits the general rubric noted above: In that case, we permitted a Tribe to restrain particular *uses* of non-Indian fee land through zoning regulations. While a six-Justice majority held that *Montana* did *not* authorize the Yakima Nation to impose zoning regulations on non-Indian fee land located in an area of the reservation where nearly half the acreage was owned by nonmembers, 492 U. S., at 430–431 (opinion of White, J.); *id.*, at 444–447 (opinion of STEVENS, J.), five Justices concluded that *Montana* did permit the Tribe to impose different zoning restrictions on nonmember fee land isolated in

"the heart of [a] closed portion of the reservation," 492 U. S., at 440 (opinion of STEVENS, J.), though the Court could not agree on a rationale, see *id.*, at 443–444 (same); *id.*, at 458–459 (opinion of Blackmun, J.).

But again, whether or not we have permitted regulation of nonmember activity on non-Indian fee land in a given case, in no case have we found that *Montana* authorized a tribe to regulate the sale of such land. Rather, our *Montana* cases have always concerned nonmember conduct on the land. See, *e. g.*, *Hicks*, 533 U. S., at 359 (*Montana* and *Strate* concern "tribal authority to regulate nonmembers' *activities* on [fee] land" (emphasis added)); *Atkinson*, 532 U. S., at 647 ("conduct of nonmembers on non-Indian fee land"); *id.*, at 660 (SOUTER, J., concurring) ("the activities of nonmembers"); *Bourland*, 508 U. S., at 689 ("use of the land"); *Brendale*, *supra*, at 430 ("use of fee land"); *Montana*, *supra*, at 565 (first exception covers "activities of nonmembers").[1]

The distinction between sale of the land and conduct on it is well established in our precedent, as the foregoing cases demonstrate, and entirely logical given the limited nature of tribal sovereignty and the liberty interests of nonmembers. By virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to managing tribal land, see *Worcester*, 6 Pet., at 561 (persons are allowed to enter Indian land only "with the assent of the [tribal members] themselves"), "protect[ing] tribal self-government," and "control[ling] internal relations," see *Montana*, *supra*, at 564. The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing

[1] JUSTICE GINSBURG questions this distinction between sales and activities on the ground that "[s]ales of land—and related conduct—are surely 'activities' within the ordinary sense of the word." *Post*, at 347 (dissenting opinion). We think the distinction is readily understandable. In any event, the question is not whether a sale is, in some generic sense, an action. The question is whether land ownership and sale are "activities" within the meaning of *Montana* and the other cited precedents.

tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated. See *Hicks*, *supra*, at 361 ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them"). Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.

The regulations we have approved under *Montana* all flow directly from these limited sovereign interests. The tribe's "traditional and undisputed power to exclude persons" from tribal land, *Duro*, 495 U. S., at 696, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations. See *Bourland*, *supra*, at 691, n. 11 ("Regulatory authority goes hand in hand with the power to exclude"). Much taxation can be justified on a similar basis. See *Colville*, 447 U. S., at 153 (taxing power "may be exercised over . . . *nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as *conditions*" (quoting *Powers of Indian Tribes*, 55 I. D. 14, 46 (1934); some emphasis added)). The power to tax certain nonmember activity can also be justified as "a necessary instrument of self-government and territorial management," *Merrion*, 455 U. S., at 137, insofar as taxation "enables a tribal government to raise revenues for its essential services," to pay its employees, to provide police protection, and in general to carry out the functions that keep peace and order, *ibid.*

JUSTICE GINSBURG wonders why these sorts of regulations are permissible under *Montana* but regulating the sale of fee land is not. See *post*, at 347. The reason is that regu-

lation of the sale of non-Indian fee land, unlike the above, cannot be justified by reference to the tribe's sovereign interests. By definition, fee land owned by nonmembers has already been removed from the tribe's immediate control. See *Strate*, 520 U. S., at 456 (tribes lack power to "assert [over non-Indian fee land] a landowner's right to occupy and exclude"). It has already been alienated from the tribal trust. The tribe cannot justify regulation of such land's sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to *be* tribal land.

Nor can regulation of fee land sales be justified by the tribe's interests in protecting internal relations and self-government. Any direct harm to its political integrity that the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands. It is at that point the tribe and its members lose the ability to use the land for their purposes. Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage.

This is not to suggest that the sale of the land will have no impact on the tribe. The *uses* to which the land is put may very well change from owner to owner, and those uses may well affect the tribe and its members. As our cases bear out, see *supra*, at 333–335, the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same. But the key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale. The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember *activity* on the land, within the limits set forth in our cases. The

tribe has no independent interest in restraining alienation of the land itself, and thus, no authority to do so.

Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." *United States* v. *Lara*, 541 U. S. 193, 212 (2004) (KENNEDY, J., concurring in judgment). The Bill of Rights does not apply to Indian tribes. See *Talton* v. *Mayes*, 163 U. S. 376, 382–385 (1896). Indian courts "differ from traditional American courts in a number of significant respects." *Hicks*, 533 U. S., at 383 (SOUTER, J., concurring). And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. See *Montana*, 450 U. S., at 564.

In commenting on the policy goals Congress adopted with the General Allotment Act, we noted that "[t]here is simply no suggestion" in the history of the Act "that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority." *Id.*, at 560, n. 9. In fact, we said it "defies common sense to suppose" that Congress meant to subject non-Indians to tribal jurisdiction simply by virtue of the nonmember's purchase of land in fee simple. *Ibid.* If Congress did not anticipate tribal jurisdiction would run with the land, we see no reason why a nonmember would think so either.

The Longs point out that the Bank in this case could hardly have been surprised by the Tribe's assertion of regu-

latory power over the parties' business dealings. The Bank, after all, had "lengthy on-reservation commercial relationships with the Long Company." Brief for Respondents 40. JUSTICE GINSBURG echoes this point. See *post*, at 345. But as we have emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not "in for a penny, in for a Pound." *Atkinson*, 532 U. S., at 656 (internal quotation marks omitted). The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions—a question we need not and do not decide. But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's sale of land it owned in fee simple.

Even the courts below recognized that the Longs' discrimination claim was a "novel" one. 491 F. 3d, at 892. It arose "directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom," including the Lakota "sense of justice, fair play and decency to others." 440 F. Supp. 2d, at 1082 (internal quotation marks omitted). The upshot was to require the Bank to offer the same terms of sale to a prospective buyer who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default. This is surely not a typical regulation. But whatever the Bank anticipated, whatever "consensual relationship" may have been established through the Bank's dealing with the Longs, the jurisdictional consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land.

The Longs acknowledge, if obliquely, the critical importance of land status. They emphasize that the Long Company "operated on reservation fee and trust lands," Brief for Respondents 40, and n. 24, 41, and note that "the fee land at issue in the lease-repurchase agreement" had previously

belonged to a tribal member, *id.*, at 47. These facts, however, do not change the status of the land at the time of the challenged sale. Regardless of where the Long Company operated, the fee land whose sale the Longs seek to restrain was owned by the Bank at the relevant time. And indeed, before that, it was owned by Kenneth Long, a non-Indian. See *Hicks*, *supra*, at 382, n. 4 (SOUTER, J., concurring) ("Land status . . . might well have an impact under one (or perhaps both) of the *Montana* exceptions"); *Atkinson*, *supra*, at 659 (SOUTER, J., concurring) (status of territory as "tribal or fee land may have much to do (as it does here) with the likelihood (or not) that facts will exist that are relevant under the [*Montana*] exceptions").

The Longs attempt to salvage their position by arguing that the discrimination claim is best read to challenge the Bank's whole course of commercial dealings with the Longs stretching back over a decade—not just the sale of the fee land. Brief for Respondents 44. That argument is unavailing. The Longs are the first to point out that their breach-of-contract and bad-faith claims, which *do* involve the Bank's course of dealings, are not before this Court. *Ibid.* Only the discrimination claim is before us and that claim is tied specifically to the sale of the fee land.[2] *Ibid.* Count six of the Longs' amended complaint in the Tribal Court alleges that "[*i*]*n selling the Longs' land*, [Plains Commerce Bank] unfairly discriminated against the Company and the Longs." App. 172–173 (emphasis added). As relief, the Longs

[2]JUSTICE GINSBURG contends that if the Tribal Court has jurisdiction over the Longs' other claims, it is hard to understand why jurisdiction would not also extend to the discrimination claim. *Post*, at 348. First, we have not said the Tribal Court has jurisdiction over the other claims: That question is not before us and we decline to speculate as to its answer. Moreover, the claims on which the Longs prevailed concern breach of a loan agreement, see App. 190, and bad faith in connection with Bureau of Indian Affairs loan guarantees, see *id.*, at 192. The present claim involves substantive regulation of the sale of fee land.

claimed they "should get possession and title to their land back." *Id.*, at 173. The Longs' discrimination claim, in short, is an attempt to regulate the terms on which the Bank may sell the land it owns.[3]

Such regulation is outside the scope of a tribe's sovereign authority. JUSTICE GINSBURG asserts that if "[t]he Federal Government and every State, county, and municipality can make nondiscrimination the law governing . . . real property transactions," tribes should be able to do so as well. *Post*, at 348–349. This argument completely overlooks the very reason cases like *Montana* and this one arise: Tribal jurisdiction, unlike the jurisdiction of the other governmental entities cited by JUSTICE GINSBURG, generally does not extend to nonmembers. See *Montana*, 450 U. S., at 565. The sovereign authority of Indian tribes is limited in ways state and federal authority is not. Contrary to JUSTICE GINSBURG's suggestion, that bedrock principle does not vary depending on the desirability of a particular regulation.

Montana provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things. The Cheyenne River Sioux Tribe lost the authority to restrain the sale of fee simple parcels inside their borders when the land was sold as part of the 1908 Allotment Act. Nothing in *Montana* gives it back.

C

Neither the District Court nor the Court of Appeals relied for its decision on the second *Montana* exception. The

[3] We point to the relief requested by the Longs—and partially granted by the Tribal Court—to rebut the Longs' contention that their claim did not focus on the sale of the fee land. Contrary to JUSTICE GINSBURG's assertion, however, the nature of this remedy does not drive our jurisdictional ruling. See *post*, at 351–352. The remedy is invalid because there is no jurisdiction, not the other way around.

Eighth Circuit declined to address the exception's applicability, see 491 F. 3d, at 888, n. 7, while the District Court strongly suggested in passing that the second exception would not apply here, see 440 F. Supp. 2d, at 1077. The District Court is correct, for the same reasons we explained above. The second *Montana* exception stems from the same sovereign interests that give rise to the first, interests that do not reach to regulating the sale of non-Indian fee land.

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U. S., at 566. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Ibid.* One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." Cohen § 4.02[3][c], at 232, n. 220.

The sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the Tribe, but cannot fairly be called "catastrophic" for tribal self-government. See *Strate*, 520 U. S., at 459. The land in question here has been owned by a non-Indian party for at least 50 years, Brief for Respondents 4, during which time the project of tribal self-government has proceeded without interruption. The land's resale to another non-Indian hardly "imperil[s] the subsistence or welfare of the Tribe." *Montana*, *supra*, at 566. Accordingly, we hold the second *Montana* exception inapplicable in this case.

D

Finally, we address the Longs' argument that the Bank consented to tribal court jurisdiction over the discrimination claim by seeking the assistance of tribal courts in serving a notice to quit. Brief for Respondents 44–46. When the Longs refused to vacate the land, the Bank initiated eviction

proceedings in South Dakota state court. The Bank then asked the Tribal Court to appoint a process server able to reach the Longs. Seeking the Tribal Court's aid in serving process on tribal members for a pending state-court action does not, we think, constitute consent to future litigation in the Tribal Court. Notably, when the Longs did file their complaint against the Bank in Tribal Court, the Bank promptly contended in its answer that the court lacked jurisdiction. Brief for United States as *Amicus Curiae* 7. Under these circumstances, we find that the Bank did not consent by its litigation conduct to tribal court jurisdiction over the Longs' discrimination claim.

* * *

The judgment of the Court of Appeals for the Eighth Circuit is reversed.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with the Court that petitioner Plains Commerce Bank (Bank) has Article III standing to contest the jurisdiction of the Cheyenne River Sioux Tribal Court, and therefore join Part II of the Court's opinion. Further, I take no issue with the Court's jurisdictional ruling insofar as it relates to the Tribal Court's supplemental judgment. In that judgment, the Tribal Court ordered the Bank to give Ronnie and Lila Long an option to repurchase fee land the Bank had already contracted to sell to non-Indian individuals. See App. to Pet. for Cert. A–69 to A–71.

I dissent from the Court's decision, however, to the extent that it overturns the Tribal Court's principal judgment awarding the Longs damages in the amount of $750,000 plus interest. See App. 194–196. That judgment did not disturb the Bank's sale of fee land to non-Indians. It simply

responded to the claim that the Bank, in its on-reservation commercial dealings with the Longs, treated them disadvantageously because of their tribal affiliation and racial identity. A claim of that genre, I would hold, is one the Tribal Court is competent to adjudicate. As the Court of Appeals correctly understood, the Longs' case, at heart, is not about "the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals," *ante*, at 320. "Rather, this case is about the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members." 491 F. 3d 878, 887 (CA8 2007) (case below).

As the basis for their discrimination claim, the Longs essentially asserted that the Bank offered them terms and conditions on land-financing transactions less favorable than the terms and conditions offered to non-Indians. Although the Tribal Court could not reinstate the Longs as owners of the ranch lands that had been in their family for decades, that court could hold the Bank answerable in damages, the law's traditional remedy for the tortious injury the Longs experienced.

I

In the pathmarking case, *Montana* v. *United States*, 450 U. S. 544, 564–565 (1981), this Court restated that, absent a treaty or statute, Indian tribes generally lack authority to regulate the activities of nonmembers. While stating the general rule, *Montana* also identified two exceptions:

> "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the politi-

> cal integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 565–566 (citations omitted).

These two exceptions, *Montana* explained, recognize that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, *even on non-Indian fee lands.*" *Id.*, at 565 (emphasis added).

Montana specifically addressed the regulatory jurisdiction of tribes. See *id.*, at 557. This Court has since clarified that when a tribe has authority to regulate the activity of nonmembers, tribal courts presumably have adjudicatory authority over disputes arising out of that activity. See *Strate* v. *A–1 Contractors*, 520 U. S. 438, 453 (1997) (as to nonmembers, a tribe's adjudicative jurisdiction coincides with its legislative jurisdiction). In my view, this is a clear case for application of *Montana*'s first or "consensual relationships" exception. I therefore do not reach the Longs' alternative argument that their complaint also fits within *Montana*'s second exception.

Ronnie and Lila Long, husband and wife and owners of the Long Family Land and Cattle Company (Long Company), are enrolled members of the Cheyenne River Sioux Tribe. Although the Long Company was incorporated in South Dakota, the enterprise "was overwhelmingly tribal in character, as were its interactions with the bank." 491 F. 3d, at 886. All Long Company property was situated—and all operations of the enterprise occurred—within the Cheyenne River Sioux Indian Reservation. The Long Company's articles of incorporation required Indian ownership of a majority of the corporation's shares. This requirement reflected the Long Company's status as an Indian-owned business entity eligible for Bureau of Indian Affairs (BIA) loan guarantees. See 25 CFR § 103.25 (2007) (requiring at least 51% Indian ownership). Loan guarantees are among the incentives the BIA offers to promote the development of on-reservation In-

dian enterprises. The Long Company "was formed to take advantage of [the] BIA incentives." 491 F. 3d, at 886.

The history of the Bank's commercial dealings with the Long Company and the Long family is lengthy and complex. The business relationship dates from 1988, when Ronnie Long's parents—one of them a member of the Tribe—mortgaged some 2,230 acres of land to the Bank to gain working capital for the ranch. As security for the Bank's loans over the years, the Longs mortgaged both their land and their personal property. The Bank benefited significantly from the Long Company's status as an Indian-owned business entity, for the BIA loan guarantees "allowed [it] to greatly reduce its lending risk." *Ibid.* Eventually, the Bank collected from the BIA almost $400,000, more than 80% of the net losses resulting from its loans to the Longs. See 440 F. Supp. 2d 1070, 1078 (SD 2006) (case below); App. 135–138.

The discrimination claim here at issue rests on the allegedly unfair conditions the Bank exacted from the Longs when they sought loans to sustain the operation of their ranch. Following the death of Ronnie's father, the Bank and the Longs entered into an agreement under which the mortgaged land would be deeded over to the Bank in exchange for the Bank's canceling some debt and making additional loans to keep the ranch in business. The Longs were given a two-year lease on the property with an option to buy the land back when the lease term expired. Negotiating sessions for these arrangements were held at the Tribe's on-reservation offices and were facilitated by tribal officers and BIA employees. 491 F. 3d, at 881.

Viewing the deal they were given in comparative light, the Longs charged that the Bank offered to resell ranch land to them on terms less advantageous than those the Bank offered in similar dealings with non-Indians. Their claim, all courts prior to this one found, fit within the *Montana* exception for "activities of nonmembers who enter [into] . . . commercial dealing, contracts, leases, or other arrangements"

with tribal members. 450 U. S., at 565. Cf. *Strate*, 520 U. S., at 457 (*Montana*'s consensual-relationships exception justifies tribal-court adjudication of claims "arising out of on-reservation sales transaction between nonmember plaintiff and member defendants" (citing *Williams* v. *Lee*, 358 U. S. 217, 223 (1959))). I am convinced that the courts below got it right.

This case, it bears emphasis, involves no unwitting outsider forced to litigate under unfamiliar rules and procedures in tribal court. Cf. *Nevada* v. *Hicks*, 533 U. S. 353, 382–385 (2001) (SOUTER, J., concurring). Hardly a stranger to the tribal court system, the Bank regularly filed suit in that forum. See Brief for Cheyenne River Sioux Tribe as *Amicus Curiae* 29–31. The Bank enlisted tribal-court aid to serve notice to quit on the Longs in connection with state-court eviction proceedings. The Bank later filed a counterclaim for eviction and motion for summary judgment in the case the Longs commenced in the Tribal Court. In its summary judgment motion, the Bank stated, without qualification, that the Tribal Court "ha[d] jurisdiction over the subject matter of this action." App. 187–188. Had the Bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements with the Longs, which the Bank drafted. See Brief for Respondents 42.

II

Resolving this case on a ground neither argued nor addressed below, the Court holds that a tribe may not impose any regulation—not even a nondiscrimination requirement—on a bank's dealings with tribal members regarding on-reservation fee lands. See *ante*, at 320, 340. I do not read *Montana* or any other case so to instruct, and find the Court's position perplexing.

First, I question the Court's separation of land sales tied to lending activities from other "activities of nonmembers who enter consensual relationships with the tribe or its members," *Montana*, 450 U. S., at 565. Sales of land—and related conduct—are surely "activities" within the ordinary sense of the word. See, *e. g.*, *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 269 (1992) ("The excise tax remains a tax upon the Indian's *activity* of selling the land . . . ." (emphasis added)). Cf. 14 Oxford English Dictionary 388 (2d ed. 1989) (defining "sale" as "[t]he action or an act of selling" (def. 1(a))).

Second, the Court notes the absence of any case "f[i]nd[ing] that *Montana* authorized a tribe to regulate the sale of [non-Indian fee] land." *Ante*, at 334. But neither have we held that *Montana* prohibits all such regulation. If the Court in *Montana*, or later cases, had intended to remove land sales resulting from loan transactions entirely from tribal governance, it could have spoken plainly to that effect. Instead, *Montana* listed as examples of consensual relationships that tribes might have authority to regulate "commercial dealing, contracts, [and] leases." 450 U. S., at 565. Presumably, the reference to "leases" includes leases of fee land. But why should a nonmember's lease of fee land to a member be differentiated, for *Montana* exception purposes, from a sale of the same land? And why would the enforcement of an antidiscrimination command be less important to tribal self-rule and dignity, cf. *ante*, at 334–337, when the command relates to land sales than when it relates to other commercial relationships between nonmembers and members?

III

As earlier observed, see *supra*, at 342, I agree that the Tribal Court had no authority to grant the Longs an option to purchase the 960-acre parcel the Bank had contracted to sell to individuals unaffiliated with the Tribe. The third

parties' contracts with the Bank cannot be disturbed based on *Montana*'s exception for "the activities of nonmembers who enter consensual relationships with the tribe or its members." 450 U. S., at 565. Although the Tribal Court overstepped in its supplemental judgment ordering the Bank to give the Longs an option to purchase land third parties had contracted to buy, see App. to Pet. for Cert. A–69 to A–71, it scarcely follows that the Tribal Court lacked jurisdiction to adjudicate the Longs' discrimination claim, and to order in its principal judgment, see App. 194–196, monetary relief.[1]

The Court recognizes that "[t]he Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions." *Ante*, at 338. Today's decision, furthermore, purports to leave the Longs' breach-of-contract and bad-faith claims untouched. *Ante*, at 339, n. 2. Noting that the Bank "does not presently challenge the breach-of-contract verdict," *ante*, at 324, the Court emphasizes that "[o]nly the discrimination claim is before us and that claim is tied specifically to the sale of the fee land," *ante*, at 339. But if the Tribal Court is a proper forum for the Longs' claim that the Bank has broken its promise or acted deceptively in the land-financing transactions at issue, one is hard put to understand why the Tribe could not likewise enforce in its courts a law that commands: Thou shall not discriminate against tribal members in the terms and conditions you offer them in those same transactions. The Federal Government

[1] The Longs joined their discrimination claim with claims of breach of contract and bad-faith dealings. The jury found in favor of the Longs on all three claims. App. 190–192. The latter claims alleged that the Bank "never provided the . . . operating loans" promised during the parties' negotiations. 491 F. 3d 878, 882 (CA8 2007). "[A]s a result," the Longs asserted, "the company was not able [to] sustain its ranching operation through the particularly harsh winter of 1996–97." *Ibid.* Nothing in the Court's opinion precludes decision of those claims by the Tribal Court. See *ante*, at 325, 326–327, 339, n. 2.

and every State, county, and municipality can make nondiscrimination the law governing contracts generally, and real property transactions in particular. See, *e. g.*, 42 U. S. C. §§ 1981, 1982. Why should the Tribe lack comparable authority to shield its members against discrimination by those engaging in on-reservation commercial relationships—including land-secured lending—with them?

A

The "fighting issue" in the tribal trial court, the Eighth Circuit underscored, "was whether the bank denied the Longs favorable terms on a deal solely on the basis of their race or tribal affiliation." 491 F. 3d, at 891. The Longs maintained that the Bank initially offered them more favorable terms, proposing to sell the mortgaged land back to them with a 20-year contract for deed. Thereafter, the Bank sent a letter to Ronnie Long withdrawing its initial offer, "citing 'possible jurisdictional problems' posed by the Long Company's status as an 'Indian owned entity on the reservation.'" *Id.*, at 882 (quoting Letter from Charles Simon, Vice President, Bank of Hoven, to Ronnie Long (Apr. 26, 1996), App. 91). In the final agreement, the Bank promised no long-term financing; instead, it gave the Longs only a two-year lease with an option to purchase that required a large balloon payment within 60 days of the lease's expiration. When the Longs were unable to make the required payment within the specified deadline, the Bank sold the land to nonmembers on more favorable terms.

In their complaint, the Longs alleged that the Bank allowed the non-Indians "ten years to pay for the land, but the bank would not permit [the] Longs even 60 days to pay for their land," and that "[s]uch unfair discrimination by the bank prevented the Longs and the [Long] Company from buying back their land from the bank." App. 173. Although the allegations about the Bank's contracts to sell to nonmembers were central to the Longs' lawsuit, those trans-

actions with third parties were not the wrong about which the Longs complained. Rather, as the tribal trial court observed, the contracts with nonmembers simply supplied "*evidence* that the Bank denied the Longs the privilege of contracting for a deed because of their status as tribal members." App. to Pet. for Cert. A–78 to A–79 (emphasis added).

The Tribal Court instructed the jury to hold the Bank liable on the discrimination claim only if the less favorable terms given to the Longs rested "solely" upon the Longs' "race or tribal identity." 491 F. 3d, at 883 (internal quotation marks omitted). In response to a special interrogatory, the jury found that "the Defendant Bank intentionally discriminate[d] against the Plaintiffs Ronnie and Lila Long [in the lease with option to purchase] based solely upon their status as Indians or tribal members." App. 191. Neither the instruction nor the special finding necessitated regulation of, or interference with, the Bank's fee-land sales to non-Indian individuals. See *ante*, at 320.[2]

Tellingly, the Bank's principal jurisdictional argument below bore no relationship to the position the Court embraces. The Bank recognized that the Longs were indeed complaining about discriminatory conduct of a familiar sort. Cf. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 413 (1968)

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[2]The Court criticizes the Tribal Court for "requir[ing] the Bank to offer the same terms of sale to a prospective buyer who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default." *Ante*, at 338. That criticism is unfair. First, the record does not confirm that the Longs were riskier buyers than the nonmembers to whom the Bank eventually sold the land. Overlooked by the Court, the Bank's loans to the Longs were sheltered by BIA loan guarantees. See *supra*, at 344–345. Further, a determination that the Longs had encountered intentional discrimination based solely on their status as tribal members in no way inhibited the Bank from differentiating evenhandedly among borrowers based on their creditworthiness. The proscription of discrimination simply required the Bank to offer the Longs the same terms it would have offered *similarly situated* non-Indians.

(42 U. S. C. § 1982 "bars *all* racial discrimination . . . in the sale or rental of property"). In *Hicks*, 533 U. S. 353, this Court held that tribal courts could not exercise jurisdiction over a claim arising under federal law, in that case, 42 U. S. C. § 1983. Relying on *Hicks*, the Bank insisted that the Longs' discrimination claim could not be heard in tribal court because it arose under well-known federal antidiscrimination law, specifically, 42 U. S. C. § 1981 or § 2000d. 491 F. 3d, at 882–883. The Tribal Court of Appeals, however, held that the claim arose under Lakota common law, which resembled federal and state antidiscrimination measures. See App. to Pet. for Cert. A–54 to A–55, and n. 5.[3]

B

The Longs requested a remedy the Tribal Court did not have authority to grant—namely, an option to repurchase land the Bank had already contracted to sell to nonmember third parties. See *supra*, at 347–348. That limitation, however, does not affect the court's jurisdiction to hear the Longs' discrimination claim and to award damages on that claim. "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether

[3] The Court types the Longs' discrimination claim as "'novel,'" *ante*, at 338 (quoting 491 F. 3d, at 892), because the Tribal Court of Appeals derived the applicable law "'directly from Lakota tradition,'" *ante*, at 338 (quoting 440 F. Supp. 2d 1070, 1082 (SD 2006) (case below)). Concerning the content of the Tribe's law, however, the appeals court drew not only from "Tribal tradition and custom," it also looked to federal and state law. See App. to Pet. for Cert. A–55. Just as state courts may draw upon federal law when appropriate, see, *e. g.*, *Dawson* v. *Birenbaum*, 968 S. W. 2d 663, 666–667 (Ky. 1998), and federal courts may look to state law to fill gaps, see, *e. g.*, *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 728–730 (1979), so too may tribal courts "borrow from the law of . . . the federal government," see F. Cohen, Handbook of Federal Indian Law § 4.05[1], p. 275 (2005 ed.). With regard to checks against discrimination, as the Tribal Court of Appeals observed, "there is a direct and laudable convergence of federal, state, and tribal concern." App. to Pet. for Cert. A–55 to A–56.

there is jurisdiction to adjudicate the controversy." *Avco Corp.* v. *Machinists*, 390 U. S. 557, 561 (1968). See also *Davis* v. *Passman*, 442 U. S. 228, 239–240, n. 18 (1979) ("*[J]urisdiction* is a question of whether a federal court has the power . . . to hear a case"; "*relief* is a question of the various remedies a federal court may make available.").

Under the procedural rules applicable in Cheyenne River Sioux Tribal Courts, as under the Federal Rules, demand for one form of relief does not confine a trial court's remedial authority. See Law and Order Code of Cheyenne River Sioux Tribe, Rule Civ. Proc. 25(c)(1) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief is not demanded in the pleadings."); Fed. Rule Civ. Proc. 54(c) (materially identical). A court does not lose jurisdiction over a claim merely because it lacks authority to provide the form of relief a party primarily demands. See *Avco*, 390 U. S., at 560–561; 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2664, pp. 181–182 (3d ed. 1998) ("[I]t is not . . . the type of relief requested in the demand that determines whether the court has jurisdiction.").[4] In such a case, authority to provide another remedy suffices to permit the court to adjudicate the merits of the claim. See *Avco*, 390 U. S., at 560–561.

* * *

For the reasons stated, I would leave undisturbed the Tribal Court's initial judgment, see App. 194–196, awarding the Longs damages, prejudgment interest, and costs as redress for the Bank's breach of contract, bad faith, and discrimination. Accordingly, I would affirm in large part the judgment of the Court of Appeals.

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[4] As in this case, see App. 177–179, the complaint in *Avco* sought injunctive relief, but also included a residual clause asking for other relief, see *Avco Corp.* v. *Aero Lodge No. 735, Int'l Assn. of Mach. and Aerospace Workers*, 376 F. 2d 337, 339 (CA6 1967).

Syllabus

GILES *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 07–6053. Argued April 22, 2008—Decided June 25, 2008

At petitioner Giles' murder trial, the court allowed prosecutors to introduce statements that the murder victim had made to a police officer responding to a domestic-violence call. Giles was convicted. While his appeal was pending, this Court held that the Sixth Amendment's Confrontation Clause gives defendants the right to cross-examine witnesses who give testimony against them, except in cases where an exception to the confrontation right was recognized at the founding. *Crawford* v. *Washington*, 541 U. S. 36, 53–54. The State Court of Appeal concluded that the Confrontation Clause permitted the trial court to admit into evidence the unconfronted testimony of the murder victim under a doctrine of forfeiture by wrongdoing. It concluded that Giles had forfeited his right to confront the victim's testimony because it found Giles had committed the murder for which he was on trial—an intentional criminal act that made the victim unavailable to testify. The State Supreme Court affirmed on the same ground.

Held: The California Supreme Court's theory of forfeiture by wrongdoing is not an exception to the Sixth Amendment's confrontation requirement because it was not an exception established at the founding. Pp. 357–373; 376–377.

(a) Common-law courts allowed the introduction of statements by an absent witness who was "detained" or "kept away" by "means or procurement" of the defendant. Cases and treatises indicate that this rule applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying. Pp. 358–361.

(b) The manner in which this forfeiture rule was applied makes plain that unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant wrongfully caused the absence of a witness, but had not done so to prevent the witness from testifying, unconfronted testimony was excluded unless it fell within the separate common-law exception to the confrontation requirement for statements made by speakers who were both on the brink of death and aware that they were dying. Pp. 361–365.

(c) Not only was California's proposed exception to the confrontation right plainly not an "exceptio[n] established at the time of the founding," *Crawford*, *supra*, at 54; it is not established in American jurisprudence

Syllabus

since the founding. No case before 1985 applied forfeiture to admit statements outside the context of conduct designed to prevent a witness from testifying. The view that the exception applies only when the defendant intends to make a witness unavailable is also supported by modern authorities, such as Federal Rule of Evidence 804(b)(6), which "codifies the forfeiture doctrine," *Davis* v. *Washington*, 547 U. S. 813, 833. Pp. 366–368.

(d) The dissent's contention that no testimony would come in at common law under a forfeiture theory unless it was confronted is not supported by the cases. In any event, if the dissent's theory were true, it would not support a broader forfeiture exception but would eliminate the forfeiture exception entirely. Previously confronted testimony by an unavailable witness is always admissible, wrongful procurement or not. See *Crawford*, *supra*, at 68. Pp. 369–373.

(e) Acts of domestic violence are often intended to dissuade a victim from resorting to outside help. A defendant's prior abuse, or threats of abuse, intended to dissuade a victim from resorting to outside help would be highly relevant to determining the intent of a defendant's subsequent act causing the witness's absence, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. Here, the state courts did not consider Giles' intent, which they found irrelevant under their interpretation of the forfeiture doctrine. They are free to consider intent on remand. Pp. 376–377.

40 Cal. 4th 833, 152 P. 3d 433, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, except as to Part II–D–2. ROBERTS, C. J., and THOMAS and ALITO, JJ., joined that opinion in full, and SOUTER and GINSBURG, JJ., joined as to all but Part II–D–2. THOMAS, J., *post*, p. 377, and ALITO, J., *post*, p. 378, filed concurring opinions. SOUTER, J., filed an opinion concurring in part, in which GINSBURG, J., joined, *post*, p. 379. BREYER, J., filed a dissenting opinion, in which STEVENS and KENNEDY, JJ., joined, *post*, p. 380.

Marilyn G. Burkhardt argued the cause for petitioner. With her on the briefs were *Donald B. Ayer*, *Meir Feder*, *Samuel Estreicher*, and *James F. Flanagan*.

Donald E. de Nicola, Deputy State Solicitor General of California, argued the cause for respondent. With him on the brief were *Edmund G. Brown, Jr.*, Attorney General, *Dane R. Gillette*, Chief Assistant Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Pamela C. Hamanaka*,

Senior Assistant Attorney General, and *Kristofer Jorstad* and *Russell A. Lehman*, Deputy Attorneys General.*

JUSTICE SCALIA delivered the opinion of the Court, except as to Part II–D–2.

We consider whether a defendant forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial.

**Jeffrey A. Lamken* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Michael A. Scodro*, Solicitor General, and *Jane Elinor Notz*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Tom Miller* of Iowa, *Stephen N. Six* of Kansas, *G. Steven Rowe* of Maine, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Marc Dann* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Patrick C. Lynch* of Rhode Island, *Lawrence E. Long* of South Dakota, *Robert E. Cooper* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for the Battered Women's Justice Project et al. by *Peter A. Barile III*; for the Domestic Violence Legal Empowerment and Appeals Project et al. by *David Salmons*, *Jennifer K. Brown*, *Lynn Hecht Schafran*, and *Joan S. Meier*; and for the National Crime Victim Law Institute by *Douglas Beloof*.

Briefs of *amici curiae* were filed for the National Association of Counsel for Children et al. by *Laura W. Brill*, *Barry Sullivan*, and *Bill S. Forcade*; for the National Association to Prevent Sexual Abuse of Children's National Child Protection Training Center by *Thomas J. Harbinson*; and for Richard D. Friedman by *Mr. Friedman*, *pro se*.

I

On September 29, 2002, petitioner Dwayne Giles shot his ex-girlfriend, Brenda Avie, outside the garage of his grandmother's house. No witness saw the shooting, but Giles' niece heard what transpired from inside the house. She heard Giles and Avie speaking in conversational tones. Avie then yelled "Granny" several times and a series of gunshots sounded. Giles' niece and grandmother ran outside and saw Giles standing near Avie with a gun in his hand. Avie, who had not been carrying a weapon, had been shot six times. One wound was consistent with Avie's holding her hand up at the time she was shot, another was consistent with her having turned to her side, and a third was consistent with her having been shot while lying on the ground. Giles fled the scene after the shooting. He was apprehended by police about two weeks later and charged with murder.

At trial, Giles testified that he had acted in self-defense. Giles described Avie as jealous, and said he knew that she had once shot a man, that he had seen her threaten people with a knife, and that she had vandalized his home and car on prior occasions. He said that on the day of the shooting, Avie came to his grandmother's house and threatened to kill him and his new girlfriend, who had been at the house earlier. He said that Avie had also threatened to kill his new girlfriend when Giles and Avie spoke on the phone earlier that day. Giles testified that after Avie threatened him at the house, he went into the garage and retrieved a gun, took the safety off, and started walking toward the back door of the house. He said that Avie charged at him, and that he was afraid she had something in her hand. According to Giles, he closed his eyes and fired several shots, but did not intend to kill Avie.

Prosecutors sought to introduce statements that Avie had made to a police officer responding to a domestic-violence report about three weeks before the shooting. Avie, who was crying when she spoke, told the officer that Giles had

accused her of having an affair, and that after the two began to argue, Giles grabbed her by the shirt, lifted her off the floor, and began to choke her. According to Avie, when she broke free and fell to the floor, Giles punched her in the face and head, and after she broke free again, he opened a folding knife, held it about three feet away from her, and threatened to kill her if he found her cheating on him. Over Giles' objection, the trial court admitted these statements into evidence under a provision of California law that permits admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy. Cal. Evid. Code Ann. §1370 (West Supp. 2008).

A jury convicted Giles of first-degree murder. He appealed. While his appeal was pending, this Court decided in *Crawford* v. *Washington*, 541 U. S. 36, 53–54 (2004), that the Confrontation Clause requires that a defendant have the opportunity to confront the witnesses who give testimony against him, except in cases where an exception to the confrontation right was recognized at the time of the founding. The California Court of Appeal held that the admission of Avie's unconfronted statements at Giles' trial did not violate the Confrontation Clause as construed by *Crawford* because *Crawford* recognized a doctrine of forfeiture by wrongdoing. 19 Cal. Rptr. 3d 843, 847 (2004) (officially depublished). It concluded that Giles had forfeited his right to confront Avie because he had committed the murder for which he was on trial, and because his intentional criminal act made Avie unavailable to testify. The California Supreme Court affirmed on the same ground. 40 Cal. 4th 833, 837, 152 P. 3d 433, 435 (2007). We granted certiorari. 552 U. S. 1136 (2008).

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be con-

fronted with the witnesses against him." The Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him. *Crawford*, 541 U. S., at 68. The State does not dispute here, and we accept without deciding, that Avie's statements accusing Giles of assault were testimonial. But it maintains (as did the California Supreme Court) that the Sixth Amendment did not prohibit prosecutors from introducing the statements because an exception to the confrontation guarantee permits the use of a witness's unconfronted testimony if a judge finds, as the judge did in this case, that the defendant committed a wrongful act that rendered the witness unavailable to testify at trial. We held in *Crawford* that the Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.*, at 54. We therefore ask whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right.

A

We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted. See *id.*, at 56, n. 6, 62. The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying. See, *e. g.*, *King* v. *Woodcock*, 1 Leach 500, 501–504, 168 Eng. Rep. 352, 353–354 (1789); *State* v. *Moody*, 3 N. C. 31 (Super. L. & Eq. 1798); *United States* v. *Veitch*, 28 F. Cas. 367, 367–368 (No. 16,614) (CC DC 1803); *King* v. *Commonwealth*, 4 Va. 78, 80–81 (Gen. Ct. 1817). Avie did not make the unconfronted statements admitted at Giles' trial when she was

dying, so her statements do not fall within this historic exception.

A second common-law doctrine, which we will refer to as forfeiture by wrongdoing, permitted the introduction of statements of a witness who was "detained" or "kept away" by the "means or procurement" of the defendant. See, *e. g.*, *Lord Morley's Case*, 6 How. St. Tr. 769, 771 (H. L. 1666) ("detained"); *Harrison's Case*, 12 How. St. Tr. 833, 851 (H. L. 1692) ("made him keep away"); *Queen* v. *Scaife*, 117 Q. B. 238, 242, 117 Eng. Rep. 1271, 1273 (Q. B. 1851) ("kept away"); see also 2 W. Hawkins, Pleas of the Crown 425 (4th ed. 1762) (hereinafter Hawkins) (same); T. Peake, Compendium of the Law of Evidence 62 (2d ed. 1804) ("sent" away); 1 G. Gilbert, Law of Evidence 214 (1791) ("detained and kept back from appearing by the means and procurement of the prisoner"). The doctrine has roots in the 1666 decision in *Lord Morley's Case*, at which judges concluded that a witness's having been "detained by the means or procurement of the prisoner" provided a basis to read testimony previously given at a coroner's inquest. 6 How. St. Tr., at 770–771. Courts and commentators also concluded that wrongful procurement of a witness's absence was among the grounds for admission of statements made at bail and committal hearings conducted under the Marian statutes, which directed justices of the peace to take the statements of felony suspects and the persons bringing the suspects before the magistrate, and to certify those statements to the court, *Crawford*, *supra*, at 43–44; J. Langbein, Prosecuting Crime in the Renaissance 10–12, 16–20 (1974). See 2 Hawkins 429. This class of confronted statements was also admissible if the witness who made them was dead or unable to travel. *Ibid.*

The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying. The rule required the witness to have been

"kept back" or "detained" by "means or procurement" of the defendant. Although there are definitions of "procure" and "procurement" that would merely require that a defendant have caused the witness's absence, other definitions would limit the causality to one that was *designed* to bring about the result "procured." See 2 N. Webster, An American Dictionary of the English Language (1828) (defining "procure" as "to *contrive* and effect" (emphasis added)); *ibid.* (defining "procure" as "[t]o get; to gain; to obtain; as by request, loan, effort, labor or purchase"); 12 Oxford English Dictionary 559 (2d ed. 1989) (def. I(3)) (defining "procure" as "[t]o contrive or devise with care (an action or proceeding); to endeavour to cause or bring about (mostly something evil) *to* or *for* a person"). Similarly, while the term "means" could sweep in all cases in which a defendant caused a witness to fail to appear, it can also connote that a defendant forfeits confrontation rights when he uses an intermediary for the purpose of making a witness absent. See 9 *id.*, at 516 ("[A] person who intercedes for another or uses influence in order to bring about a desired result"); N. Webster, An American Dictionary of the English Language 822 (1869) ("That through which, or by the help of which, an end is attained").

Cases and treatises of the time indicate that a purpose-based definition of these terms governed. A number of them said that prior testimony was admissible when a witness was kept away by the defendant's "means and contrivance." See 1 J. Chitty, A Practical Treatise on the Criminal Law 81 (1816) ("kept away by the means and contrivance of the prisoner"); S. Phillipps, A Treatise on the Law of Evidence 165 (1814) ("kept out of the way by the means and contrivance of the prisoner"); *Drayton* v. *Wells*, 10 S. C. L. 409, 411 (S. C. 1819) ("kept away by the contrivance of the opposite party"). This phrase requires that the defendant have schemed to bring about the absence from trial that he "contrived." Contrivance is commonly defined as the act of "inventing, devising or planning," 1 Webster, *supra*, at 47

(1828), "ingeniously endeavouring the accomplishment of anything," "the bringing to pass by planning, scheming, or stratagem," or "[a]daption of means to an end; design, intention," 3 Oxford English Dictionary, *supra*, at 850.[1]

An 1858 treatise made the purpose requirement more explicit still, stating that the forfeiture rule applied when a witness "had been kept out of the way by the prisoner, or by some one on the prisoner's behalf, *in order to prevent him from giving evidence against him.*" E. Powell, The Practice of the Law of Evidence 166 (1858) (emphasis added). The wrongful-procurement exception was invoked in a manner consistent with this definition. We are aware of no case in which the exception was invoked although the defendant had not engaged in conduct designed to prevent a witness from testifying, such as offering a bribe.

B

The manner in which the rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or

[1] The dissent asserts that a defendant could have "contrived, *i. e.*, devised or planned . . . to murder a victim" without the purpose of keeping the victim away from trial. See *post*, at 392 (opinion of BREYER, J.). But that would not be contriving to keep the witness away. The dissent further suggests that these authorities are irrelevant because "the relevant phrase" in *Lord Morley's Case* itself is "'by the *means or* procurement'" of the defendant and means "may, *or may not*, refer to an absence that the defendant desired, as compared to an absence that the defendant caused." *Post*, at 392 (emphasis added). But the authorities we cited resolve this ambiguity in favor of purpose by substituting for the "means or procurement" of *Lord Morley's Case* either "contrivance" or "means *and* contrivance." (Emphasis added.)

fell within the dying-declarations exception. Prosecutors do not appear to have even *argued* that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial.

Consider *King* v. *Woodcock*. William Woodcock was accused of killing his wife Silvia, who had been beaten and left near death. A Magistrate took Silvia Woodcock's account of the crime, under oath, and she died about 48 hours later. The judge stated that "[g]reat as a crime of this nature must always appear to be, yet the inquiry into it must proceed upon the rules of evidence." 1 Leach, at 500, 168 Eng. Rep., at 352. Aside from testimony given at trial in the presence of the prisoner, the judge said, there were "two other species which are admitted by law: The one is the dying declaration of a person who has received a fatal blow; the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him" taken under the Marian bail and committal statutes. *Id.*, at 501, 168 Eng. Rep., at 352–353 (footnote omitted). Silvia Woodcock's statement could not be admitted pursuant to the Marian statutes because it was unconfronted—the defendant had not been brought before the examining Magistrate and "the prisoner therefore had no opportunity of contradicting the facts it contains." *Id.*, at 502, 168 Eng. Rep., at 353. Thus, the statements were admissible only if the witness "apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions." *Id.*, at 503, 168 Eng. Rep., at 353–354 (footnote omitted). Depending on the account one credits, the court either instructed the jury to consider the statements only if Woodcock was "in fact under the apprehension of death," *id.*, at 504, 168 Eng. Rep., at 354, or determined for itself that Woodcock was "quietly resigned and submitting to her fate" and admitted her statements into evidence, 1 E. East, Pleas of the Crown 356 (1803).

King v. *Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791), applied the same test to exclude unconfronted statements by a murder victim. George Dingler was charged with killing his wife Jane, who suffered multiple stab wounds that left her in the hospital for 12 days before she died. The day after the stabbing, a Magistrate took Jane Dingler's deposition—as in *Woodcock*, under oath—"of the facts and circumstances which had attended the outrage committed upon her." 2 Leach, at 561, 168 Eng. Rep., at 383. George Dingler's attorney argued that the statements did not qualify as dying declarations and were not admissible Marian examinations because they were not taken in the presence of the prisoner, with the result that the defendant did not "have, as he is entitled to have, the benefit of cross-examination." *Id.*, at 562, 168 Eng. Rep., at 384. The prosecutor agreed, but argued the deposition should still be admitted because "it was the best evidence that the nature of the case would afford." *Id.*, at 563, 168 Eng. Rep., at 384. Relying on *Woodcock*, the court "refused to receive the examination into evidence." 2 Leach, at 563, 168 Eng. Rep., at 384.

Many other cases excluded victims' statements when there was insufficient evidence that the witness was aware he was about to die. See *Thomas John's Case*, 1 East 357, 358 (P. C. 1790); *Welbourn's Case*, 1 East 358, 360 (P. C. 1792); *United States* v. *Woods*, 28 F. Cas. 762, 763 (No. 16,760) (CC DC 1834); *Lewis* v. *State*, 17 Miss. 115, 120 (1847); *Montgomery* v. *State*, 11 Ohio 424, 425–426 (1842); *Nelson* v. *State*, 26 Tenn. 542, 543 (1847); *Smith* v. *State*, 28 Tenn. 9, 23 (1848). Courts in all these cases did not even consider admitting the statements on the ground that the defendant's crime was to blame for the witness's absence—even when the evidence establishing that was overwhelming. The reporter in *Woodcock* went out of his way to comment on the strength of the case against the defendant: "The evidence, independent of the information or declarations of the deceased, was

of a very pressing and urgent nature against the prisoner." 1 Leach, at 501, 168 Eng. Rep., at 352.

Similarly, in *Smith* v. *State*, *supra*, the evidence that the defendant had caused the victim's death included, but was not limited to, the defendant's having obtained arsenic from a local doctor a few days before his wife became violently ill; the defendant's paramour testifying at trial that the defendant admitted to poisoning his wife; the defendant's having asked a physician "whether the presence of arsenic could be discovered in the human stomach a month after death"; and, the answer to that inquiry apparently not having been satisfactory, the defendant's having tried to hire a person to burn down the building containing his wife's body. *Id.*, at 10–11. If the State's reading of common law were correct, the dying declarations in these cases and others like them would have been admissible.

Judges and prosecutors also failed to invoke forfeiture as a sufficient basis to admit unconfronted statements in the cases that did apply the dying-declarations exception. This failure, too, is striking. At a murder trial, presenting evidence that the defendant was responsible for the victim's death would have been no more difficult than putting on the government's case in chief. Yet prosecutors did not attempt to obtain admission of dying declarations on wrongful-procurement-of-absence grounds before going to the often considerable trouble of putting on evidence to show that the crime victim had not believed he could recover. See, *e. g.*, *King* v. *Commonwealth*, 4 Va., at 80–81 (three witnesses called to testify on the point); *Gibson* v. *Commonwealth*, 4 Va. 111, 116–117 (Gen. Ct. 1817) (testimony elicited from doctor and witness); *Anthony* v. *State*, 19 Tenn. 265, 278–279 (1838) (doctor questioned about expected fatality of victim's wound and about victim's demeanor).

The State offers another explanation for the above cases. It argues that when a defendant committed some act of wrongdoing that rendered a witness unavailable, he forfeited

his right to object to the witness's testimony on confrontation grounds, but not on hearsay grounds. See Brief for Respondent 23–24. No case or treatise that we have found, however, suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights. And the distinction would have been a surprising one, because courts prior to the founding excluded hearsay evidence in large part *because* it was unconfronted. See, *e. g.*, 2 Hawkins 606 (6th ed. 1787); 2 M. Bacon, A New Abridgment of the Law 313 (1736). As the plurality said in *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970), "[i]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots."

The State and the dissent note that common-law authorities justified the wrongful-procurement rule by invoking the maxim that a defendant should not be permitted to benefit from his own wrong. See, *e. g.*, G. Gilbert, Law of Evidence 140–141 (1756) (if a witness was "detained and kept back from appearing by the means and procurement" testimony would be read because a defendant "shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong"). But as the evidence amply shows, the "wrong" and the "evil Practices" to which these statements referred was conduct *designed* to prevent a witness from testifying. The absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them. There is nothing mysterious about courts' refusal to carry the rationale further. The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to "dispensing with jury trial because a defendant is obviously guilty." *Crawford*, 541 U. S., at 62.

C

Not only was the State's proposed exception to the right of confrontation plainly not an "exceptio[n] established at the time of the founding," *id.*, at 54; it is not established in American jurisprudence *since* the founding. American courts never—prior to 1985—invoked forfeiture outside the context of deliberate witness tampering.

This Court first addressed forfeiture in *Reynolds* v. *United States*, 98 U. S. 145 (1879), where, after hearing testimony that suggested the defendant had kept his wife away from home so that she could not be subpoenaed to testify, the trial court permitted the Government to introduce testimony of the defendant's wife from the defendant's prior trial. See *id.*, at 148–150. On appeal, the Court held that admission of the statements did not violate the right of the defendant to confront witnesses at trial, because when a witness is absent by the defendant's "wrongful procurement," the defendant "is in no condition to assert that his constitutional rights have been violated" if "their evidence is supplied in some lawful way." *Id.*, at 158. *Reynolds* invoked broad forfeiture principles to explain its holding. The decision stated, for example, that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts," *ibid.*, and that the wrongful-procurement rule "has its foundation" in the principle that no one should be permitted to take advantage of his wrong, and is "the outgrowth of a maxim based on the principles of common honesty," *id.*, at 159.

Reynolds relied on these maxims (as the common-law authorities had done) to be sure. But it relied on them (as the common-law authorities had done) to admit prior testimony in a case where the defendant had engaged in wrongful conduct designed to prevent a witness's testimony. The Court's opinion indicated that it was adopting the common-law rule. It cited leading common-law cases—*Lord Morley's Case*,

Harrison's Case, and *Scaife*—described itself as "content with" the "long-established usage" of the forfeiture principle, and admitted prior confronted statements under circumstances where admissibility was open to no doubt under *Lord Morley's Case*. *Reynolds*, *supra*, at 158–159.

If the State's rule had a historical pedigree in the common law or even in the 1879 decision in *Reynolds*, one would have expected it to be routinely invoked in murder prosecutions like the one here, in which the victim's prior statements inculpated the defendant. It was never invoked in this way. The earliest case identified by the litigants and *amici curiae* which admitted unconfronted statements on a forfeiture theory without evidence that the defendant had acted with the purpose of preventing the witness from testifying was decided in 1985. *United States* v. *Rouco*, 765 F. 2d 983 (CA11).

In 1997, this Court approved a Federal Rule of Evidence, entitled "Forfeiture by wrongdoing," which applies only when the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Fed. Rule Evid. 804(b)(6). We have described this as a rule "which codifies the forfeiture doctrine." *Davis* v. *Washington*, 547 U. S. 813, 833 (2006). Every commentator we are aware of has concluded the requirement of intent "means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." 5 C. Mueller & L. Kirkpatrick, Federal Evidence §8:134, p. 235 (3d ed. 2007); 5 J. Weinstein & M. Berger, Weinstein's Federal Evidence §804.03[7][b], p. 804–32 (J. McLaughlin ed., 2d ed. 2008); 2 K. Broun, McCormick on Evidence 176 (6th ed. 2006).[2] The

[2]Only a single state evidentiary code appears to contain a forfeiture rule broader than our holding in this case (and in *Crawford* v. *Washington*, 541 U. S. 36 (2004)) allow. Seven of the twelve States that recognize wrongdoing as grounds for forfeiting objection to out-of-court statements duplicate the language of the federal forfeiture provision that requires

commentators come out this way because the dissent's claim that knowledge is sufficient to show intent is emphatically *not* the modern view. See 1 W. LaFave, Substantive Criminal Law § 5.2, p. 340 (2d ed. 2003).

In sum, our interpretation of the common-law forfeiture rule is supported by (1) the most natural reading of the language used at common law; (2) the absence of common-law cases *admitting* prior statements on a forfeiture theory when the defendant had not engaged in conduct designed to prevent a witness from testifying; (3) the common law's uniform exclusion of unconfronted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in the innumerable cases in which the defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony; (4) a subsequent history in which the dissent's broad forfeiture theory has not been applied. The first two and the last are highly persuasive; the third is in our view conclusive.

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purpose, see Del. Rule Evid. 804(b)(6) (2001); Ky. Rule Evid. 804(b)(5) (2004); N. D. Rule Evid. 804(b)(6) (2007); Pa. Rule Evid. 804(b)(6) (2005); Vt. Rule Evid. 804(b)(6) (2004); see also Tenn. Rule Evid. 804(b)(6) (2003) (identical except that it excludes mention of acquiescence); Mich. Rule Evid. 804(b)(6) (2008) (substitutes "engaged in or encouraged" for "engaged or acquiesced in"). Two others require "purpose" by their terms. Ohio Rule Evid. 804(B)(6) (2008); Cal. Evid. Code Ann. § 1350 (West Supp. 2008). Two of the three remaining forfeiture provisions require the defendant to have "procured" the unavailability of a witness, Haw. Rule 804(b)(7) (2007); Md. Cts. & Jud. Proc. Code Ann. § 10–901 (Lexis 2006)—which, as we have discussed, is a term traditionally used in the forfeiture context to require intent. Maryland's rule has thus been described as "requir[ing] that the judge must find that [the] wrongdoing or misconduct was undertaken with the intent of making the witness unavailable to testify." 6A L. McLain, Maryland Evidence, State and Federal § 804(6):1, p. 230 (West Supp. 2007–2008). These rules cast more than a little doubt on the dissent's assertion that the historic forfeiture rule creates intolerable problems of proof. The lone forfeiture exception whose text reaches more broadly than the rule we adopt is an Oregon rule adopted in 2005. See 2005 Ore. Laws p. 1232, ch. 458 (S. B. 287).

D

1

The dissent evades the force of that third point by claiming that *no* testimony would come in at common law based on a forfeiture theory unless it was confronted. It explains the exclusion of murder victims' testimony by arguing that wrongful procurement was understood to be a basis for admission of Marian depositions—which the defendant would have had the opportunity to confront—but not for the admission of unconfronted testimony. See *post*, at 394.

That explanation is not supported by the cases. In *Harrison's Case*, the leading English case finding wrongful procurement, the witness's statements were admitted without regard to confrontation. An agent of the defendant had attempted to bribe a witness, who later disappeared under mysterious circumstances. The prosecutor contended that he had been "spirited, or withdrawn from us, by a gentleman that said he came to [the witness] from the prisoner, and desired him to be kind to the prisoner." 12 How. St. Tr., at 851. The court allowed the witness's prior statements before the coroner to be read, *id.*, at 852, although there was no reason to think the defendant would have been present at the prior examination.[3]

[3] Wrongful procurement was also described as grounds for admitting unconfronted testimony in *Fenwick's Case*, 13 How. St. Tr. 537 (H. C. 1696), a parliamentary attainder proceeding. Although many speakers argued for admission of unconfronted testimony simply because Parliament was not bound by the rules of evidence for felony cases, see *Crawford*, *supra*, at 46, it was also argued that witness tampering could be a basis for admitting unconfronted statements even in common-law felony trials: "[W]here persons do stand upon their lives, accused for crimes, if it appears to the court that the prisoner hath, by fraudulent and indirect means, procured a person that hath given information against him to a proper magistrate, to withdraw himself, so that he cannot give evidence as regularly as they used to do; in that case his information hath been read; which, I suppose, with humble submission, is this case . . . ," 13 How. St. Tr., at 594 (remarks of Lovel). The dissent responds that in most circumstances in

The reasoning of the common-law authorities reinforces the conclusion that the wrongful-procurement rule did not depend on prior confrontation. The judge in *Harrison's Case*, after being told that "Mr. Harrison's agents or friends have, since the last sessions, made or conveyed away a young man that was a principal evidence against him," declared that if this were proved, "it will no way conduce to Mr. Harrison's advantage." *Id.*, at 835–836. Similarly, a leading treatise's justification of the use of statements from coroner's inquests when a witness was "detained and kept back from appearing by the means and procurement" of the defendant was that the defendant "shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong." G. Gilbert, Law of Evidence 141 (1756). But if the defendant could keep out unconfronted prior testimony of a wrongfully detained witness he *would* profit from "such evil Practices."

While American courts understood the admissibility of statements made at prior proceedings (including coroner's inquests like the one in *Harrison's Case*) to turn on prior opportunity for cross-examination as a general matter, see *Crawford*, 541 U. S., at 47, n. 2, no such limit was applied or expressed in early wrongful-procurement cases. In *Rex* v. *Barber*, 1 Root 76 (Conn. Super. Ct. 1775), "[o]ne White, who had testified before the justice and before the grand-jury against Barber, and minutes taken of his testimony, was sent away by one Bullock, a friend of Barber's, and by his instigation; so that he could not be had to testify before the petit-jury. The court admitted witnesses to relate what White had before testified." Two leading evidentiary treatises and a Delaware case reporter cite that case for the proposition

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which a witness had given information against a defendant before "'a proper magistrate,'" the testimony would have been confronted. *Post*, at 399. Perhaps so, but the speaker was arguing that the wrongful-procurement exception applied in "this case"—*Fenwick's Case*, in which the testimony was unconfronted, see 13 How. St. Tr., at 591–592.

that grand jury statements were admitted on a wrongful-procurement theory. See Phillipps, Treatise on Evidence, at 200, n. (*a*); T. Peake, Compendium of the Law of Evidence 91, n. (m) (American ed. 1824); *State* v. *Lewis*, 1 Del. Cas. 608, 609, n. 1 (Ct. Quarter Sess. 1818). (Of course the standard practice since approximately the 17th century has been to conduct grand jury proceedings in secret, without confrontation, in part so that the defendant does not learn the State's case in advance. S. Beale, W. Bryson, J. Felman, & M. Elston, Grand Jury Law and Practice §5.2 (2d ed. 2005); see also 8 J. Wigmore, Evidence §2360, pp. 728–735 (J. McNaughton rev. ed. 1961).)[1]

The Georgia Supreme Court's articulation of the forfeiture rule similarly suggests that it understood forfeiture to be a basis for admitting unconfronted testimony. The court wrote that *Lord Morley's Case* established that if a witness "who had been examined by the Crown, and was then absent, was detained by the means or procurement of the prisoner," "then the examination should be read" into evidence. *Williams* v. *State*, 19 Ga. 402, 403 (1856). Its rule for all cases in which the witness "had been examined by the Crown" carried no confrontation limit, and indeed, the court adopted the rule from *Lord Morley's Case* which involved not Marian examinations carrying a confrontation requirement, but coroner's inquests that lacked one.

The leading American case on forfeiture of the confrontation right by wrongful procurement was our 1879 decision in *Reynolds*. That case does not set forth prior confrontation

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[1]Three commentators writing more than a century after the *Barber* decision said, without explanation, that they understood the case to have admitted only confronted testimony at a preliminary examination. W. Best, Principles of the Law of Evidence 473, n. (*e*.) (American ed. 1883); J. Stephen, A Digest of the Law of Evidence 161 (1902); 2 J. Bishop, New Criminal Procedure §1197, p. 1024 (2d ed. 1913). We know of no basis for that understanding. The report of the case does not limit the admitted testimony to statements that were confronted.

as a requirement for the doctrine's application, and begins its historical analysis with a full description of the rule set forth in *Lord Morley's Case*, which itself contained no indication that the admitted testimony must have been previously confronted. It followed that description with a citation of *Harrison's Case*—which, like *Lord Morley's Case*, applied wrongful procurement to coroner's inquests, not confronted Marian examinations—saying that the rule in those cases "seems to have been recognized as the law in England ever since." 98 U. S., at 158. The opinion's description of the forfeiture rule is likewise unconditioned by any requirement of prior confrontation:

> "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he kept away. . . . [The Constitution] grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." *Ibid.*

There is no mention in this paragraph of a need for prior confrontation, even though if the Court believed such a limit applied, the phrase "their evidence is supplied" would more naturally have read "their previously confronted evidence is supplied." *Crawford* reaffirmed this understanding by citing *Reynolds* for a forfeiture exception to the confrontation right. 541 U. S., at 54. And what *Reynolds* and *Crawford* described as the law became a seeming holding of this Court in *Davis*, which, after finding an absent witness's unconfronted statements introduced at trial to have been testimo-

nial, and after observing that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation," 547 U. S., at 833, remanded with the instruction that "[t]he Indiana courts may (if they are asked) determine on remand whether . . . a claim of forfeiture is properly raised and, if so, whether it is meritorious," *id.*, at 834.

Although the case law is sparse, in light of these decisions and the absence of even a single case *declining* to admit unconfronted statements of an absent witness on wrongful-procurement grounds when the defendant sought to prevent the witness from testifying, we are not persuaded to displace the understanding of our prior cases that wrongful procurement permits the admission of prior unconfronted testimony.

But the parsing of cases aside, the most obvious problem with the dissent's theory that the forfeiture rule applied only to confronted testimony is that it amounts to self-immolation. If it were true, it would destroy not only our case for a narrow forfeiture rule, but the dissent's case for a broader one as well. Prior *confronted* statements by witnesses who are unavailable are admissible whether or not the defendant was responsible for their unavailability. 541 U. S., at 68. If the forfeiture doctrine did not admit unconfronted prior testimony at common law, the conclusion must be, not that the forfeiture doctrine requires no specific intent in order to render unconfronted testimony available, but that unconfronted testimony is subject to no forfeiture doctrine at all.[5]

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[5] The dissent attempts to reconcile its approach with *Crawford* by saying the wrongful-procurement cases used language "broad enough" to reach every case in which a defendant committed wrongful acts that caused the absence of a victim, and that there was therefore an "'exception'" "'established at the time of the founding,'" *post*, at 383, reaching all such misconduct. But an exception to what? The dissent contends that it was *not* an exception to confrontation. Were that true, it would be the end of the *Crawford* inquiry.

2

Having destroyed its own case, the dissent issues a thinly veiled invitation to overrule *Crawford* and adopt an approach not much different from the regime of *Ohio* v. *Roberts*, 448 U. S. 56 (1980), under which the Court would create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood. The "basic purposes and objectives" of forfeiture doctrine, it says, require that a defendant who wrongfully caused the absence of a witness be deprived of his confrontation rights, whether or not there was any such rule applicable at common law. *Post*, at 384.

If we were to reason from the "basic purposes and objectives" of the forfeiture doctrine, we are not at all sure we would come to the dissent's favored result. The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in "the ability of courts to protect the integrity of their proceedings." *Davis*, *supra*, at 834. The boundaries of the doctrine seem to us intelligently fixed so as to avoid a principle repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty (after less than a full trial, mind you, and of course before the jury has pronounced guilt) should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong.[6]

[6]The dissent identifies one circumstance—and only one—in which a court may determine the outcome of a case before it goes to the jury: A judge may determine the existence of a conspiracy in order to make incriminating statements of co-conspirators admissible against the defendant under Federal Rule of Evidence 801(d)(2)(E). *Bourjaily* v. *United States*, 483 U. S. 171 (1987), held that admission of the evidence did not violate the Confrontation Clause because it "falls within a firmly rooted hearsay exception"—the test under *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980), the case that *Crawford* overruled. In fact it did not violate the Confrontation Clause for the quite different reason that it was not (as an incrimi-

Since it is most certainly *not* the norm that trial rights can be "forfeited" on the basis of a prior judicial determination of guilt, the dissent must go far afield to argue even by analogy for its forfeiture rule. See *post*, at 384–385 (discussing common-law doctrine that prohibits the murderer from collecting insurance on the life of his victim, or an inheritance from the victim's estate); *post*, at 386 (noting that many criminal statutes punish a defendant regardless of his purpose). These analogies support propositions of which we have no doubt: States may allocate property rights as they see fit, and a murderer can and should be punished, without regard to his purpose, after a fair trial. But a legislature may not "punish" a defendant for his evil acts by stripping him of the right to have his guilt in a criminal proceeding determined *by a jury*, and on the basis of evidence the Constitution deems reliable and admissible.

The larger problem with the dissent's argument, however, is that the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider "fair." It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen. It "does

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nating statement in furtherance of the conspiracy would probably never be) testimonial. The co-conspirator hearsay rule does not pertain to a constitutional right and is in fact quite unusual.

We do not say, of course, that a judge can never be allowed to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling. That must sometimes be done under the forfeiture rule that we adopt—when, for example, the defendant is on trial for murdering a witness in order to prevent his testimony. But the exception to ordinary practice that we support is (1) needed to protect the integrity of court proceedings, (2) based upon longstanding precedent, and (3) much less expansive than the exception proposed by the dissent.

not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Crawford*, 541 U. S., at 54.[7]

E

The dissent closes by pointing out that a forfeiture rule which ignores *Crawford* would be particularly helpful to women in abusive relationships—or at least particularly helpful in punishing their abusers. Not as helpful as the dissent suggests, since only *testimonial* statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing. In any event, we are puzzled by the dissent's decision to devote its peroration to domestic-abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

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[7] The dissent also implies that we should not adhere to *Crawford* because the confrontation guarantee limits the evidence a State may introduce without limiting the evidence a defendant may introduce. See *post*, at 388–389. That is true. Just as it is true that the State cannot decline to provide testimony harmful to its case or complain of the lack of a speedy trial. The asymmetrical nature of the Constitution's criminal-trial guarantees is not an anomaly, but the intentional conferring of privileges designed to prevent criminal conviction of the innocent. The State is at no risk of that.

The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. This is not, as the dissent charges, *post*, at 404, nothing more than "knowledge-based intent." (Emphasis deleted.)

The state courts in this case did not consider the intent of the defendant because they found that irrelevant to application of the forfeiture doctrine. This view of the law was error, but the court is free to consider evidence of the defendant's intent on remand.

* * *

We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter. The judgment of the California Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I write separately to note that I adhere to my view that statements like those made by the victim in this case do not implicate the Confrontation Clause. The contested evidence is indistinguishable from the statements made during police

questioning in response to the report of domestic violence in *Hammon* v. *Indiana*, decided with *Davis* v. *Washington*, 547 U. S. 813 (2006). There, as here, the police questioning was not "a formalized dialogue"; it was not "sufficiently formal to resemble the Marian examinations" because "the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality"; and "there is no suggestion that the prosecution attempted to offer [Ms. Avie's] hearsay evidence at trial in order to evade confrontation." See *id.*, at 840 (THOMAS, J., concurring in judgment in part and dissenting in part).

Nonetheless, in this case respondent does not argue that the contested evidence is nontestimonial, *ante*, at 358; the court below noted "no dispute" on the issue, 40 Cal. 4th 833, 841, 152 P. 3d 433, 438 (2007); and it is outside the scope of the question presented, Brief for Petitioner i. Because the Court's opinion accurately reflects our Confrontation Clause jurisprudence where the applicability of that Clause is not at issue, I join the Court in vacating the decision below.

JUSTICE ALITO, concurring.

I join the Court's opinion, but I write separately to make clear that, like JUSTICE THOMAS, I am not convinced that the out-of-court statement at issue here fell within the Confrontation Clause in the first place. The dissent's displeasure with the result in this case is understandable, but I suggest that the real problem concerns the scope of the confrontation right. The Confrontation Clause does not apply to out-of-court statements unless it can be said that they are the equivalent of statements made at trial by "witnesses." U. S. Const., Amdt. 6. It is not at all clear that Ms. Avie's statement falls within that category. But the question whether Ms. Avie's statement falls within the scope of the Clause is not before us, and assuming for the sake of argument that the statement falls within the Clause, I agree with the Court's analysis of the doctrine of forfeiture by wrongdoing.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in part.

I am convinced that the Court's historical analysis is sound, and I join all but Part II–D–2 of the opinion. As the Court demonstrates, the confrontation right as understood at the framing and ratification of the Sixth Amendment was subject to exception on equitable grounds for an absent witness's prior relevant, testimonial statement, when the defendant brought about the absence with intent to prevent testimony. It was, and is, reasonable to place the risk of untruth in an unconfronted, out-of-court statement on a defendant who meant to preclude the testing that confrontation provides. The importance of that intent in assessing the fairness of placing the risk on the defendant is most obvious when a defendant is prosecuted for the very act that causes the witness's absence, homicide being the extreme example. If the victim's prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim's statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; evidence that the defendant killed would come in because the defendant probably killed. The only thing saving admissibility and liability determinations from question begging would be (in a jury case) the distinct functions of judge and jury: judges would find by a preponderance of evidence that the defendant killed (and so would admit the testimonial statement), while the jury could so find only on proof beyond a reasonable doubt. Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying. Cf. *Davis* v. *Washington*, 547 U. S. 813, 833 (2006).

It is this rationale for the limit on the forfeiture exception rather than a dispositive example from the historical record that persuades me that the Court's conclusion is the right one in this case. The contrast between the Court's and JUS-

TICE BREYER's careful examinations of the historical record tells me that the early cases on the exception were not calibrated finely enough to answer the narrow question here. The historical record as revealed by the exchange simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its culminating act; today's understanding of domestic abuse had no apparent significance at the time of the framing, and there is no early example of the forfeiture rule operating in that circumstance.

Examining the early cases and commentary, however, reveals two things that count in favor of the Court's understanding of forfeiture when the evidence shows domestic abuse. The first is the substantial indication that the Sixth Amendment was meant to require some degree of intent to thwart the judicial process before thinking it reasonable to hold the confrontation right forfeited; otherwise the right would in practical terms boil down to a measure of reliable hearsay, a view rejected in *Crawford* v. *Washington*, 541 U. S. 36 (2004). The second is the absence from the early material of any reason to doubt that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger. The Court's conclusion in Part II–E thus fits the rationale that equity requires and the historical record supports.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE KENNEDY join, dissenting.

In *Crawford* v. *Washington*, 541 U. S. 36 (2004), we held that the Sixth Amendment's Confrontation Clause bars ad-

mission against a criminal defendant of an un-cross-examined "testimonial" statement that an unavailable witness previously made out of court. *Id.*, at 68. We simultaneously recognized an exception: that the defendant, by his own "wrongdoing," can forfeit "on essentially equitable grounds" his Confrontation Clause right. *Id.*, at 62. In *Davis* v. *Washington*, 547 U. S. 813 (2006), we again recognized this exception, stating that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Id.*, at 833.

This case involves a witness who, crying as she spoke, told a police officer how her former boyfriend (now, the defendant) had choked her, "opened a folding knife," and "threatened to kill her." *Ante*, at 357 (opinion of the Court). Three weeks later, the defendant did kill her. At his murder trial, the defendant testified that he had acted in self-defense. To support that assertion, he described the victim as jealous, vindictive, aggressive, and violent. To rebut the defendant's claim of self-defense and impeach his testimony, the State introduced into evidence the witness' earlier un-cross-examined statements (as state hearsay law permits it to do) to help rebut the defendant's claim of self-defense. It is important to underscore that this case is premised on the assumption, not challenged here, that the witness' statements are testimonial for purposes of the Confrontation Clause. With that understanding, we ask whether the defendant, through his wrongdoing, has forfeited his Confrontation Clause right. The Court concludes that he may not have forfeited that right. In my view, however, he has.

I

Like the majority, I believe it important to recognize the relevant history, and I start where the majority starts, with *Lord Morley's Case*, 6 How. St. Tr. 769 (H. L. 1666). In that case, the judges of the House of Lords wrote that a coroner's out-of-court "examinations" of witnesses "might be read" in court if "the witnesses . . . were dead, or unable to travel."

Id., at 770. Additionally, they agreed, an examination "might be read" if the "witness who had been examined by the coroner, and was then absent, *was detained by the means or procurement of the prisoner.*" *Id.*, at 770–771 (emphasis added). Later cases repeated this rule and followed it, admitting depositions where, *e. g.*, "there ha[d] been evidence given of ill practice to take [the witness] out of the way," *Harrison's Case*, 12 How. St. Tr. 833, 868 (H. L. 1692), where "the prisoner ha[d], by fraudulent and indirect means, procured a person that hath given information against him to a proper magistrate, to withdraw himself," *Lord Fenwick's Case*, 13 How. St. Tr. 537, 594 (H. C. 1696), where the prisoner "had resorted to a contrivance to keep the witness out of the way," *Queen* v. *Scaife*, 117 Q. B. 238, 242, 117 Eng. Rep. 1271, 1273 (Q. B. 1851), and so forth.

Nineteenth-century American case law on the subject said approximately the same thing. See *Reynolds* v. *United States*, 98 U. S. 145, 158 (1879). For example, an 1819 South Carolina case held that a witness' prior formal examination could be admitted because "the witness had been kept away by the contrivance of the opposite party." *Drayton* v. *Wells*, 10 S. C. L. 409, 411. An 1856 Georgia case, relying on *Lord Morley's Case*, held that a similar "examination should be read" if the witness "was detained by the means or procurement of the prisoner." *Williams* v. *State*, 19 Ga. 402, 403. And in 1878, this Court held that "if a witness is absent by [the defendant's] own wrongful procurement, he cannot complain" about the admission of the witness' prior testimonial statement. *Reynolds*, *supra*, at 158.

Reynolds stated that, "if [the defendant] voluntarily keeps the witnesses away, he cannot insist on" the "privilege of being confronted with the witnesses against him," in part because of *Lord Morley's Case* and in part because the rule of forfeiture "has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong[,] . . .

a maxim based on the principles of common honesty." 98 U. S., at 158–159.

These sources make clear that "forfeiture by wrongdoing" satisfies *Crawford*'s requirement that the Confrontation Clause be "read as a reference to the right of confrontation at common law" and that "any exception" must be "established at the time of the founding." 541 U. S., at 54. The remaining question concerns the precise metes and bounds of the forfeiture by wrongdoing exception. We ask how to apply that exception in the present case.

II

There are several strong reasons for concluding that the forfeiture by wrongdoing exception applies here—reasons rooted in common-law history, established principles of criminal law and evidence, and the need for a rule that can be applied without creating great practical difficulties and evidentiary anomalies.

First, the language that courts have used in setting forth the exception is broad enough to cover the wrongdoing at issue in the present case (murder) and much else besides. A witness whom a defendant murders is kept from testifying "by the means . . . of the prisoner," *i. e.*, the defendant, *Lord Morley's Case*, *supra*, at 771; murder is indeed an "ill practice" that leads to the witness' absence, *Harrison's Case*, *supra*, at 868; one can fairly call a murder a "contrivance to keep the witness out of the way," *Queen* v. *Scaife*, *supra*, at 242, 117 Eng. Rep., at 1273; murder, if not a "fraudulent and indirect means" of keeping the witness from testifying, is a far worse, direct one, *Fenwick's Case*, *supra*, at 594; and when a witness is "absent" due to murder, the killer likely brought about that absence by his "own wrongful procurement," *Reynolds*, *supra*, at 158. All of the relevant English and American cases use approximately similar language. See, *e. g.*, 1 G. Gilbert, Law of Evidence 214–215 (1791) (ex-

aminations are "to be read on the Trial" where it can be proved that the witness is "kept back from appearing by the means and procurement of the prisoner"). And I have found no case that uses language that would not bring a murder and a subsequent trial for murder within its scope.

Second, an examination of the forfeiture rule's basic purposes and objectives indicates that the rule applies here. At the time of the founding, a leading treatise writer described the forfeiture rule as designed to ensure that the prisoner "shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong." *Ibid.* This Court's own leading case explained the exception as finding its "foundation in the maxim that no one shall be permitted to take advantage of his own wrong." *Reynolds*, *supra*, at 159. What more "evil practice," what greater "wrong," than to murder the witness? And what greater evidentiary "advantage" could one derive from that wrong than thereby to prevent the witness from testifying, *e. g.*, preventing the witness from describing a history of physical abuse that is not consistent with the defendant's claim that he killed her in self-defense?

Third, related areas of the law motivated by similar equitable principles treat forfeiture or its equivalent similarly. The common law, for example, prohibits a life insurance beneficiary who murders an insured from recovering under the policy. See, *e. g.*, *New York Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 600 (1886) ("It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken"). And it forbids recovery when the beneficiary "feloniously kills the insured, *irrespective of the purpose*." *National Life Ins. Co.* v. *Hood's Adm'r*, 264 Ky. 516, 518, 94 S. W. 2d 1022, 1023 (Ct. App. 1936) (emphasis added) ("no difference of opinion among the courts" on the matter). Similarly, a beneficiary of a will who murders the testator

cannot inherit under the will. See 1 W. Page, Wills § 17.19, pp. 999–1001 (2003). And this is so "whether the crime was committed for that very purpose or with some other felonious design." *Van Alstyne* v. *Tuffy*, 103 Misc. 455, 459, 169 N. Y. S. 173, 175 (1918); see also 1 Page, *supra*, § 17.19, at 1002 ("This common law doctrine applies alike whether the devisee is guilty of murder, or of manslaughter" (footnote omitted)); see generally H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 76–94 (W. Eskridge & P. Frickey eds. 1994) (discussing so-called "slayer's rules"); Wade, Acquisition of Property by Willfully Killing Another—A Statutory Solution, 49 Harv. L. Rev. 715, 716 (1936) ("It must be recognized . . . that the adoption of some means to prevent a slayer from acquiring property as the result of the death of a man whom he has killed is desirable").

Fourth, under the circumstances presented by this case, there is no difficulty demonstrating the defendant's intent. This is because the defendant here knew that murdering his ex-girlfriend would keep her from testifying; and that knowledge is sufficient to show the *intent* that law ordinarily demands. As this Court put the matter more than a century ago: A "'man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it.'" *Allen* v. *United States*, 164 U. S. 492, 496 (1896); see *United States* v. *Aguilar*, 515 U. S. 593, 613 (1995) (SCALIA, J., concurring in part and dissenting in part) ("[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts"); see also G. Williams, Criminal Law § 18, p. 38 (2d ed. 1961) ("There is one situation where a consequence is deemed to be intended though it is not desired. This is where it is foreseen as substantially certain"); ALI, Model Penal Code § 2.02(2)(b)(ii) (1962) (a person acts "knowingly" if "the element involves a result of

his conduct" and "he is aware that it is practically certain that his conduct will cause such a result"); Restatement (Second) of Torts §8A (1977) ("The word 'intent' is used throughout . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it").

With a few criminal law exceptions not here relevant, the law holds an individual responsible for consequences known likely to follow just as if that individual had intended to achieve them. A defendant, in a criminal or a civil case, for example, cannot escape criminal or civil liability for murdering an airline passenger by claiming that his purpose in blowing up the airplane was to kill only a single passenger for her life insurance, not the others on the same flight. See 1 W. LaFave, Substantive Criminal Law §5.2(a), p. 341 (2d ed. 2003).

This principle applies here. Suppose that a husband, H, knows that after he assaulted his wife, W, she gave statements to the police. Based on the fact that W gave statements to the police, H also knows that it is possible he will be tried for assault. If H then kills W, H cannot avoid responsibility for intentionally preventing W from testifying, not even if H says he killed W because he was angry with her and not to keep her away from the assault trial. Of course, the trial here is not for assault; it is for murder. But I should think that this fact, because of the nature of the crime, would count as a stronger, not a weaker, reason for applying the forfeiture rule. Nor should it matter that H, at the time of the murder, may have *believed* an assault trial *more likely* to take place than a murder trial, for W's unavailability to testify at *any* future trial was a *certain* consequence of the murder. And any reasonable person would have known it. Cf. *United States* v. *Falstaff Brewing Corp.*, 410 U. S. 526, 570, n. 22 (1973) (Marshall, J., concurring in result) ("[P]erhaps the oldest rule of evidence—that a man is presumed to intend the natural and probable consequences

of his acts—is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent").

The majority tries to overcome this elementary legal logic by claiming that the "forfeiture rule" applies, not where the defendant *intends* to prevent the witness from testifying, but only where that is the defendant's *purpose*, *i. e.*, that the rule applies only where the defendant acts from a particular *motive*, a *desire* to keep the witness from trial. See *ante*, at 359, 360 (asserting that the terms used to describe the scope of the forfeiture rule "suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying" and that a "purpose-based definition . . . governed"). But the law does not often turn matters of responsibility upon *motive*, rather than *intent*. See *supra*, at 385–386. And there is no reason to believe that application of the rule of forfeiture constitutes an exception to this general legal principle.

Indeed, to turn application of the forfeiture rule upon proof of the defendant's *purpose* (rather than *intent*), as the majority does, creates serious practical evidentiary problems. Consider H who assaults W, knows she has complained to the police, and then murders her. H *knows* that W will be unable to testify against him at any future trial. But who knows whether H's knowledge played a major role, a middling role, a minor role, or no role at all, in H's decision to kill W? Who knows precisely what passed through H's mind at the critical moment? See, *e. g.*, *State* v. *Romero*, 2007–NMSC–013, 156 P. 3d 694, 702–703 (finding it doubtful that evidence associated with the murder would support a finding that the *purpose* of the murder was to keep the victim's earlier statements to police from the jury).

Moreover, the majority's insistence upon a showing of *purpose* or *motive* cannot be squared with the exception's basically ethical objective. If H, by killing W, is able to keep W's testimony out of court, then he has successfully "take[n]

advantage of his own wrong." *Reynolds*, 98 U. S., at 159. And he does so whether he killed her *for the purpose of* keeping her from testifying, with *certain knowledge* that she will not be able to testify, or with *a belief* that rises to a *reasonable level of probability*. The inequity consists of his being able to *use* the killing to keep out of court her statements against him. That inequity exists whether the defendant's state of mind is purposeful, intentional (*i. e.*, with knowledge), or simply probabilistic.

Fifth, the majority's approach both creates evidentiary anomalies and aggravates existing evidentiary incongruities. Contrast (1) the defendant who assaults his wife and subsequently threatens her with harm if she testifies, with (2) the defendant who assaults his wife and subsequently murders her in a fit of rage. Under the majority's interpretation, the former (whose threats make clear that his purpose was to prevent his wife from testifying) cannot benefit from his wrong, but the latter (who has committed what is undoubtedly the greater wrong) can. This is anomalous, particularly in this context where an equitable rule applies.

Now consider a trial of H for the murder of W at which H claims self-defense. As the facts of this very case demonstrate, H may be allowed to testify at length and in damning detail about W's behavior—what she said as well as what she did—both before and during the crime. See, *e. g.*, Tr. 643–645 (Apr. 1, 2003). H may be able to introduce some of W's statements (as he remembers them) under hearsay exceptions for excited utterances or present sense impressions or to show states of mind (here the victim's statements were admitted through petitioner's testimony to show her state of mind). W, who is dead, cannot reply. This incongruity arises in part from the nature of hearsay and the application of ordinary hearsay rules. But the majority would aggravate the incongruity by prohibiting admission of W's out-of-court statements to the police (which contradict H's account), even when they too fall within a hearsay exception, simply

because there is *no evidence that H was focused on his future trial* when he killed her. There is no reason to do so.

Consider also that California's hearsay rules authorize admission of the out-of-court statement of an unavailable declarant where the statement describes or explains the "infliction or threat of physical injury upon the declarant," if the "statement" was "made at or near the time of the infliction or threat of physical injury." Cal. Evid. Code Ann. §1370 (West Supp. 2008). Where a victim's statement is not "testimonial," perhaps because she made it to a nurse, the statement could come into evidence under this Rule. But where the statement is made formally to a police officer, the majority's rule would keep it out. Again this incongruity arises in part because of pre-existing confrontation-related rules. See *Davis*, 547 U. S., at 831, n. 5 ("[F]ormality is indeed essential to testimonial utterance"). But, again, the majority would aggravate the incongruity by prohibiting admission of W's out-of-court statements to the police simply because there is *no evidence that H was focused on his future trial* when he killed her. Again, there is no reason to do so.

Sixth, to deny the majority's interpretation is not to deny defendants evidentiary safeguards. It does, of course, in this particular area, deny defendants the right *always* to cross-examine. But the hearsay rule has always contained exceptions that permit the admission of evidence where the need is significant and where alternative safeguards of reliability exist. Those exceptions have evolved over time, see 2 K. Broun, McCormick on Evidence §326 (6th ed. 2006) (discussing the development of the modern hearsay rule); Fed. Rule Evid. 102 ("These rules shall be construed to secure . . . promotion of growth and development of the law of evidence"), often in a direction that permits admission of hearsay only where adequate alternative assurance of reliability exists, see, *e. g.*, Rule 807 (the "Residual Exception"). Here, for example, the presence in court of a witness who took the declarant's statement permits cross-examination of that

witness as to just what the declarant said and as to the surrounding circumstances, while those circumstances themselves provide sufficient guarantees of accuracy to warrant admission under a State's hearsay exception. See Cal. Evid. Code Ann. § 1370.

More importantly, to apply the forfeiture exception here simply lowers a constitutional barrier to admission of earlier testimonial statements; it does not *require* their admission. State hearsay rules remain in place; and those rules will determine when, whether, and how evidence of the kind at issue here will come into evidence. A State, for example, may enact a forfeiture rule as one of its hearsay exceptions, while simultaneously reading into that rule requirements limiting its application. See *ante*, at 367–368, n. 2. To lower the constitutional barrier to admission is to allow the States to do just that, *i. e.*, to apply their evidentiary rules with flexibility and to revise their rules as experience suggests would be advisable. The majority's rule, which requires exclusion, would deprive the States of this freedom and flexibility.

III

A

The majority tries to find support for its view in 17th-, 18th-, and 19th-century law of evidence. But a review of the cases set forth in Part I, *supra*, makes clear that no case limits forfeiture to instances where the defendant's *purpose* or *motivation* is to keep the witness away. See *supra*, at 381–383. To the contrary, this Court stated in *Reynolds* that the "Constitution does not guarantee an accused person against the *legitimate* consequences of his own wrongful acts." 98 U. S., at 158 (emphasis added). The words "legitimate consequences" do *not* mean "desired consequences" or refer to purpose or motive; in fact, the words "legitimate consequences" can encompass *imputed* consequences as well as *intended* consequences. And this Court's statement in

Reynolds that the rule "has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong" suggests that forfeiture applies where the defendant benefits from a witness' absence, regardless of the defendant's specific purpose. *Id.*, at 159.

Rather than limit forfeiture to instances where the defendant's act has absence of the witness as its *purpose*, the relevant cases suggest that the forfeiture rule would apply where the witness' absence was the *known consequence* of the defendant's intentional wrongful act. *Lord Morley's Case* and numerous others upon which the forfeiture rule is based say that a Marian deposition (*i. e.*, a deposition taken by a coroner or magistrate pursuant to the Marian bail and commitment statutes) may be read to the jury if the witness who was absent was detained "by the means or procurement of the prisoner." *Lord Morley's Case*, 6 How. St. Tr., at 771. The phrase "by means of" focuses on what the defendant *did*, not his *motive for (or purpose in) doing it*. In *Diaz* v. *United States*, 223 U. S. 442 (1912), which followed *Reynolds*, this Court used the word "by" (the witness was absent "by the wrongful act of" the accused), a word that suggests causation, not motive or purpose. 223 U. S., at 452; see *Eureka Lake & Yuba Canal Co.* v. *Superior Court of Yuba Cty.*, 116 U. S. 410, 418 (1886). And in *Motes* v. *United States*, 178 U. S. 458, 473–474 (1900), the Court spoke of absence "with the assent of" the defendant, a phrase perfectly consistent with an absence that is *a consequence of*, not *the purpose of*, what the assenting defendant hoped to accomplish.

Petitioner's argument that the word "procurement" implies purpose or motive is unpersuasive. See Brief for Petitioner 26–28. Although a person may "procure" a result purposefully, a person may also "procure" a result by causing it, as the word "procure" can, and at common law did, mean "cause," "bring about," and "effect," all words that say nothing about motive or purpose. 2 N. Webster, An American Dictionary of the English Language (1828); see also 2 C.

Richardson, New Dictionary of the English Language 1514 (1839) (defining "procure" to mean "[t]o take care for; to take care or heed, . . . that any thing be done; to urge or endeavor, to manage or contrive that it be done; to acquire; to obtain"). The majority's similar argument about the word "contrivance" fares no better. See *ante*, at 360 (citing, *e. g.*, 1 J. Chitty, A Practical Treatise on the Criminal Law 81 (1816) (hereinafter Chitty) ("kept away by the means and contrivance of the prisoner")). Even if a defendant had contrived, *i. e.*, devised or planned, to murder a victim, thereby keeping her away, it does not mean that he did so with the purpose of keeping her away in mind. Regardless, the relevant phrase in *Lord Morley's Case* is "by the *means or* procurement of" the defendant. 6 How. St. Tr., at 771 (emphasis added). And, as I have explained, an absence "by means of" the defendant's actions may, or may not, refer to an absence that the defendant desired, as compared to an absence that the defendant caused.

The sole authority that expressly supports the majority's interpretation is an 1858 treatise stating that depositions were admissible if the witness "had been kept out of the way by the prisoner, or by some one on the prisoner's behalf, in order to prevent him from giving evidence against him." E. Powell, Practice of the Law of Evidence 166. This treatise was written nearly 70 years after the founding; it does not explain the basis for this conclusion; and, above all, it concerns a *complete* exception to the *hearsay rule*. Were there no such limitation, all a murder victim's hearsay statements, not simply the victim's testimonial statements, could be introduced into evidence. Here we deal only with a constitutional bar to the admission of *testimonial* statements. And an exception from the general constitutional bar does not automatically admit the evidence. Rather, it leaves the State free to decide, via its own hearsay rules and hearsay exceptions, which such statements are sufficiently reliable to admit.

B

Given the absence of any evidence squarely requiring purpose rather than intent, what is the majority to say? The majority first tries to draw support from the *absence* of any *murder* case in which the victim's Marian statement was read to the jury on the ground that the defendant had killed the victim. See *ante*, at 361–364. I know of no instance in which this Court has drawn a conclusion about the meaning of a common-law rule *solely* from the absence of cases showing the contrary—at least not where there are other plausible explanations for that absence. And there are such explanations here.

The most obvious reason why the majority cannot find an instance where a court applied the rule of forfeiture at a murder trial is that many (perhaps all) common-law courts thought the rule of forfeiture irrelevant in such cases. In a murder case, the relevant witness, the murder victim, was dead; and historical legal authorities tell us that, when a witness was dead, the common law admitted a Marian statement. See, *e. g.*, *Lord Morley's Case*, *supra*, at 770–777 (Marian depositions "might be read" if the witness was "dead or unable to travel"); *King* v. *Woodcock*, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789) ("[I]f the deponent should die between the time of examination and the trial of the prisoner, [the Marian deposition] may be substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact"); J. Archbold, A Summary of the Law Relative to Pleading and Evidence in Criminal Cases 85 (1822) (where a witness was "dead," "unable to travel," or "kept away by the means or procurement of the prisoner," Marian depositions "may be given in evidence against the prisoner"). Because the Marian statements of a deceased witness were admissible simply by virtue of the witness' death, there would have been no need to argue for their admission pursuant to a forfeiture rule.

Historical authorities also tell us that a Marian statement could not be admitted unless it was a *proper* Marian deposition, meaning that the statement was given in the presence of the defendant thereby providing an opportunity to cross-examine the witness. And this was the case whether the witness' unavailability was due to death or the "means or procurement" of the defendant. See, *e. g.*, *ibid.* (Where a witness was "dead," "unable to travel," or "kept away by the means or procurement of the prisoner" depositions could be read but they "*must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness*" (emphasis added)); 2 W. Hawkins, Pleas of the Crown 605–606 (6th ed. 1787) (hereinafter Hawkins); Chitty 78–80; 2 J. Bishop, New Criminal Procedure §§ 1194–1195, pp. 1020–1022 (2d ed. 1913) (hereinafter Bishop); *Lord Fenwick's Case*, 13 How. St. Tr., at 602. Thus, in a murder trial, where the witness was dead, either the Marian statement was proper and it came into evidence *without* the forfeiture exception; or it was improper and the forfeiture exception *could not have helped it come in.* Cf. *King* v. *Dingler*, 2 Leach 561, 563, 168 Eng. Rep. 383, 384 (1791) (a top barrister of the day argued successfully that "it is utterly impossible, unless the prisoner had been present [at the Marian deposition], that depositions thus taken can be read"). No wonder then that the majority cannot find a murder case that refers directly to the forfeiture exception. Common-law courts likely thought the forfeiture exception irrelevant in such a case.

The majority highlights two common-law murder cases that demonstrate this point—*King* v. *Woodcock* and *King* v. *Dingler*. See *ante*, at 362–363. As the majority explains, in each of these two cases, the defendant stood accused of killing his wife. In each case, the victim had given an account of the crime prior to her death. And in each case, the court refused to admit the statements (statements that might have been admitted simply by virtue of the fact that

the witness had died) on the ground that they were not properly taken Marian statements, *i. e.*, not made in the presence of the defendant. Because admission pursuant to the forfeiture rule also would have required the statements to have been properly taken, there would have been no reason to argue for their admission on that basis. Instead, in each case, the prosecution argued that the statement be admitted as a dying declaration. In *Woodcock*, depending on the account, the court either instructed the jury to consider whether the statements were made "under the apprehension of death," or determined for itself that they were and admitted them into evidence. 1 Leach, at 504, 168 Eng. Rep., at 354; see 1 E. East, Pleas of the Crown 356 (1803) (reprinted 2004). In *Dingler*, because the Crown admitted that the statements were not made "under apprehension of immediate death," the statements were excluded. 2 Leach, at 563, 168 Eng. Rep., at 384. The forfeiture rule thus had no place in *Woodcock* or *Dingler*, not because of the state of mind of the defendant when he committed his crime, but because the victim's testimony was not a properly taken Marian statement.

The American murder cases to which the majority refers provide it no more support. See *ante*, at 363 (citing *United States* v. *Woods*, 28 F. Cas. 762, 763 (No. 16,760) (CC DC 1834); *Lewis* v. *State*, 17 Miss. 115, 120 (1847); *Montgomery* v. *State*, 11 Ohio 424, 425–426 (1842); *Nelson* v. *State*, 26 Tenn. 542, 543 (1847); *Smith* v. *State*, 28 Tenn. 9, 23 (1848)). Like *Woodcock* and *Dingler*, these are dying declaration cases. While it is true that none refers to the forfeiture exception, it is also true that none of these cases involved a previously given proper Marian deposition or its equivalent.

There are other explanations as well for the absence of authority to which the majority points. The defendant's state of mind only arises as an issue in forfeiture cases where the witness has made prior statements against the defendant and where there is a possible motive for the killing other than to prevent the witness from testifying. (Where that

motive is certain—for example, where the defendant knows the witness only because she has previously testified against him—the prior statements would be admitted under the majority's purpose rule, and the question of intent would not come up.) We can see from modern cases that this occurs almost exclusively in the domestic violence context, where a victim of the violence makes statements to the police and where it is not certain whether the defendant subsequently killed her to prevent her from testifying, to retaliate against her for making statements, or in the course of another abusive incident. But 200 years ago, it might have been seen as futile for women to hale their abusers before a Marian magistrate where they would make such a statement. See, *e. g.*, *State* v. *Rhodes*, 61 N. C. 453, 459 (1868) *(per curiam)* ("We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence").

I also recognize the possibility that there are too few old records available for us to draw firm conclusions. Indeed, the "continuing confusion about the very nature of the law of evidence at the end of the eighteenth century underscores how primitive and undertheorized the subject then was." J. Langbein, The Origins of Adversary Criminal Trial 248 (2003).

Regardless, the first explanation—that the forfeiture doctrine could not have helped admit an improperly taken Marian deposition—provides a sufficient ground to conclude that the majority has found nothing in the common-law murder cases, domestic or foreign, that contradicts the traditional legal principles supporting application of the rule of forfeiture here. See Williams, Criminal Law § 18, at 39 (relying on sources at common law for the proposition that the accused "necessarily intends that which must be the consequence of the act" (internal quotation marks omitted)); LaFave, Substantive Criminal Law § 5.2(a), at 341 ("[T]he traditional

view is that a person who acts . . . intends a result of his act . . . when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result").

The majority next points to a second line of common-law cases, cases in which a court admitted a murdered witness' "dying declaration." But those cases do not support the majority's conclusion. A dying declaration can come into evidence when it is "made in extremity" under a sense of impending death, "when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth." *Woodcock*, *supra*, at 502, 168 Eng. Rep., at 353; see *King* v. *Drummond*, 1 Leach 337, 338, 168 Eng. Rep. 271, 272 (1784) ("[T]he mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath"); see also Hawkins 619, n. 10; *Mattox* v. *United States*, 156 U. S. 237, 243–244 (1895). The majority notes that prosecutors did not attempt to obtain admission of dying declarations on forfeiture grounds before trying to meet these strict "dying declaratio[n]" requirements. See *ante*, at 364. This failure, it believes, supports its conclusion that admission pursuant to the forfeiture exception required a showing that the defendant killed the witness with the *purpose* of securing the absence of that witness at trial.

There is a simpler explanation, however, for the fact that parties did not argue forfeiture in "dying declaration" cases. And it is the explanation I have already mentioned. The forfeiture exception permitted admission only of a properly taken Marian deposition. And where death was at issue, the forfeiture exception was irrelevant. In other words, if the Marian deposition was proper, the rule of forfeiture was unnecessary; if the deposition was improper, the rule of forfeiture was powerless to help. That is why we find lawyers

in "dying declaration" cases arguing that the dying declaration was either a proper Marian deposition (in which case it was admitted) or it was a "dying declaration" (in which case it was admitted), or both. See, *e. g.*, *Dingler*, 2 Leach, at 562, 168 Eng. Rep., at 383–384 (discussing the admission of statements either "as a deposition taken pursuant to the [Marian] statutes" or, in the alternative, "as the dying declaration of a party conscious of approaching dissolution"); *King* v. *Radbourne*, 1 Leach 457, 460–461, 168 Eng. Rep. 330, 332 (1787) (same); *People* v. *Restell*, 3 Hill 289 (N. Y. 1842) (same); see also Chitty 79–81. Under these circumstances, there would have been little reason to add the word "forfeiture."

For the same reason, we can find "dying declarations" admitted in murder cases where no proper Marian deposition existed, see, *e. g.*, *King* v. *Woodcock*, 1 Leach 500, 168 Eng. Rep. 352; 1 East, Pleas of the Crown, at 356, or in cases involving, say, wills or paternity disputes, where Marian statements were not at all at issue, see 5 J. Wigmore, Evidence § 1431, p. 277, n. 2 (J. Chadbourn rev. ed. 1974) (citing such cases from the 18th and 19th centuries). Cf. Langbein, *supra*, at 245–246, nn. 291, 292 (at common law, there existed both oath-based and cross-examination-based rationales for the hearsay rule, with the latter only becoming dominant around the turn of the 19th century (citing Gallanis, The Rise of Modern Evidence Law, 84 Iowa L. Rev. 499, 516–550 (1999))).

The upshot is that the majority fails to achieve its basic objective. It cannot show that the common law insisted upon a showing that a defendant's purpose or motive in killing a victim was to prevent the victim from testifying. At the least its authority is consistent with my own view, that the prosecution in such a case need show no more than intent (based on knowledge) to do so. And the most the majority might show is that the common law was not clear on the point.

IV

A

The majority makes three arguments in response. First, it says that I am wrong about unconfronted statements at common law. According to the majority, when courts found wrongful procurement, they admitted a defendant's statements without regard to whether they were confronted. See *ante*, at 369–373. That being so, the majority's argument goes, one must wonder why no one argued for admissibility under the forfeiture rule in, say, *Woodcock* or *Dingler*. See *ante*, at 362–363. The reason, the majority concludes, is that the forfeiture rule would not have helped secure admission of the (unconfronted) prior statements in those cases, because the forfeiture rule applied only where the defendant *purposely* got rid of the witness. See *ante*, at 361. But the majority's house of cards has no foundation; it is built on what is at most common-law silence on the subject. The cases it cites tell us next to nothing about admission of unconfronted statements.

Fenwick's Case, see *ante*, at 369–370, n. 3, for example, was a parliamentary attainder proceeding; Parliament voted to admit unconfronted statements but it is not clear what arguments for admission Parliament relied upon. See generally 13 How. St. Tr. 537. Hence it is not clear that Parliament admitted *unconfronted* statements pursuant to a forfeiture theory. In fact, the forfeiture rule in a felony case was described in *Fenwick's Case* as applying where the witness "hath given information against [the defendant] to a proper magistrate," *id.*, at 594 (remarks of Lovel), *i. e.*, a magistrate who normally would have had the defendant before him as well.

Harrison's Case, see *ante*, at 369–370, did admit an unconfronted statement, but it was a statement made before a *coroner*. See 12 How. St. Tr., at 852. Coroner's statements seem to have had special status that may sometimes have

permitted the admission of prior unconfronted testimonial statements despite lack of cross-examination. But, if so, that special status failed to survive the Atlantic voyage. See *Crawford*, 541 U. S., at 47, n. 2 (early American authorities "flatly rejected any special status for coroner statements").

The American case upon which the majority primarily relies, *Rex* v. *Barber*, 1 Root 76 (Conn. Super. Ct. 1775), see *ante*, at 370, consists of three sentences that refer to "[o]ne White, who had testified before the justice and before the grand-jury against Barber." 1 Root, at 76. White was "sent away" at Barber's "instigation" and the "court admitted witnesses to relate what White had before testified." *Ibid.* I cannot tell from the case whether White's statement was made before a grand jury or was taken before a justice where cross-examination would have been possible. At least some commentators seem to think the latter. See W. Best, The Principles of the Law of Evidence 467, 473, n. (*e*.) (American ed. 1883) (listing *Barber* as a case "of preliminary investigation before a magistrate" where "evidence ha[d] been admitted, there having been a right of cross-examination"); 2 Bishop §§ 1194–1197, at 1020–1024 (explaining that where a witness had been "kept out of the way" by the defendant, his prior testimony is admissible if "the defendant had the opportunity to cross-examine the witness against him, not otherwise," and giving as a "[f]amiliar illustration" of this principle cases before a committing magistrate including *Barber* (footnotes omitted)); J. Stephen, A Digest of the Law of Evidence 161, American Note, General (1902) (citing *Barber* for the proposition that evidence at a preliminary hearing was admissible if "the party against whom it is offered was present").

The majority's final authority, *Williams* v. *State*, 19 Ga., at 403, see *ante*, at 371, involved the admission of an "examination" taken by "the committing Magistrate." Such examinations were ordinarily given in the presence of the defendant.

See R. Greene & J. Lumpkin, Georgia Justice 99 (1835) (describing procedures relevant to a magistrate's examination of a witness in Georgia); see also M. M'Kinney, The American Magistrate and Civil Officer 235 (1850) (testimony of the accuser and his witnesses taken by a magistrate "must be done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses").

At the same time, every Supreme Court case to apply the forfeiture rule has done so in the context of previously confronted testimony. See, *e. g.*, *Reynolds*, 98 U. S., at 158 (admitting previously confronted statements pursuant to a forfeiture rule); *Diaz*, 223 U. S., at 449 (same); *Mattox*, 156 U. S., at 240 (same); *Motes*, 178 U. S., at 470–471 (same).

Of course, modern courts have changed the ancient common-law forfeiture rule—in my view, for the better. They now admit unconfronted prior testimonial statements pursuant to such a rule. See, *e. g.*, *United States* v. *Carlson*, 547 F. 2d 1346, 1357–1360 (CA8 1976) (the earliest case to do so); *United States* v. *Mastrangelo*, 693 F. 2d 269 (CA2 1982); *United States* v. *Rouco*, 765 F. 2d 983 (CA11 1985); see also *Davis*, 547 U. S., at 834. But, as the dates of these cases indicate, the admission of unconfronted statements under a forfeiture exception is a fairly recent evidentiary development. The majority evidently finds this elephant of a change acceptable—as do I. Without it, there would be no meaningful modern-day forfeiture exception. Why then does the majority strain so hard at what, comparatively speaking, is a gnat (and a nonexistent gnat at that)?

In sum, I have tried to show the weakness of the foundation upon which the majority erects its claim that the common law applied the forfeiture rule only where it was a defendant's *purpose* or *motive* (not his *intent* based on knowledge) to keep the witness away. The majority says that "the most natural reading of the language used at common law" supports its view. *Ante*, at 368. As I have shown, that is not so. See *supra*, at 383–384. The majority

next points to "the absence of common-law cases *admitting* prior statements on a forfeiture theory" where the defendant prevented, but did not *purposely* prevent, the witness from testifying. *Ante*, at 368. As I have pointed out, this absence proves nothing because (1) the relevant circumstances (there has been a prior testimonial statement, the witness is now unavailable due to defendant's actions, and the defendant knows that the witness will not testify but that is not his purpose) are likely to arise almost exclusively when the defendant murders the witness, and (2) a forfeiture theory was ordinarily redundant or useless in such cases. See *supra*, at 393–394. The majority, describing its next argument as "conclusive," points to "innumerable cases" where courts did not admit "unconfronted inculpatory testimony by murder victims" against a defendant. *Ante*, at 368. The majority is referring to those dying declaration cases in which unconfronted statements were not admitted because the witness was not sufficiently aware of his impending death when he made them. See *ante*, at 363–364. But as I have explained, the forfeiture rule would have been unhelpful under these circumstances. See *supra*, at 397–398. Finally, the majority points to a "subsequent history" in the United States where questions about the defendant's state of mind did not begin to arise until the 1980's. *Ante*, at 368. I have explained why that history does not support its view. See *supra*, at 401. Having only begun to swallow the elephant in the late 1970's and early 1980's, it makes sense that courts would not have previously considered the gnat.

While I have set forth what I believe is the better reading of the common-law cases, I recognize that different modern judges might read that handful of cases differently. All the more reason then *not* to reach firm conclusions about the precise metes and bounds of a contemporary forfeiture exception by trying to guess the state of mind of 18th-century lawyers when they decided *not* to make a particular argument, *i. e.*, forfeiture, in a reported case. That is why, in

Part II, *supra*, I have set forth other, more conclusive reasons in support of the way I would read the exception.

Second, the plurality objects to that aspect of the forfeiture rule that requires a judge to make a preliminary assessment of the defendant's wrongful act in order to determine whether the relevant statements should be admitted. See *ante*, at 374–375. But *any* forfeiture rule requires a judge to determine as a preliminary matter that the defendant's own wrongdoing caused the witness to be absent. Regardless, preliminary judicial determinations are not, as the majority puts it, "akin . . . to 'dispensing with jury trial.'" *Ante*, at 365 (quoting *Crawford*, 541 U. S., at 62). We have previously said that courts may make preliminary findings of this kind. For example, where a defendant is charged with conspiracy, the judge is permitted to make an initial finding that the conspiracy existed so as to determine whether a statement can be admitted under the co-conspirator exception to the hearsay rule. See *Bourjaily* v. *United States*, 483 U. S. 171, 175–176 (1987) ("The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied"). And even the plurality is forced to admit that it is "sometimes" necessary for a "judge . . . to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling." *Ante*, at 375, n. 6.

Third, the plurality seems to believe that an ordinary intent requirement, rather than a purpose or motive requirement, would let in too much out-of-court testimonial evidence. See *ante*, at 374–376. Ordinarily a murderer would know that his victim would not be able to testify at a murder trial. Hence all of the victim's prior testimonial statements would come in at trial for use against a defendant. To insist upon a showing of purpose rather than plain (knowledge-based) intent would limit the amount of unconfronted evidence that the jury might hear.

This argument fails to account for the fact that overcoming a constitutional objection does not guarantee admissibility of the testimonial evidence at issue. The States will still control admissibility through hearsay rules and exceptions. And why not? What important constitutional interest is served, say, where a prior testimonial statement of a victim of abuse is at issue, by a constitutional rule that lets that evidence in if the defendant killed a victim *purposely* to stop her from testifying, but keeps it out if the defendant killed her *knowing* she could no longer testify while acting out of anger or revenge?

B

Even the majority appears to recognize the problem with its "purpose" requirement, for it ends its opinion by creating a kind of presumption that will transform *purpose* into *knowledge-based intent*—at least where domestic violence is at issue; and that is the area where the problem is most likely to arise.

JUSTICE SOUTER, concurring in part, says:

> "[The requisite] element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger." *Ante*, at 380.

This seems to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim. Doing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying is in effect

not to insist upon a showing of "purpose." Consequently, I agree with this formulation, though I would apply a simple intent requirement across the board.

V

The rule of forfeiture is implicated primarily where domestic abuse is at issue. In such a case, a murder victim may have previously given a testimonial statement, say, to the police, about an abuser's attacks; and introduction of that statement may be at issue in a later trial for the abuser's subsequent murder of the victim. This is not an uncommon occurrence. Each year, domestic violence results in more than 1,500 deaths and more than 2 million injuries; it accounts for a substantial portion of all homicides; it typically involves a history of repeated violence; and it is difficult to prove in court because the victim is generally reluctant or unable to testify. See Bureau of Justice Statistics, Homicide Trends in the U. S. 1976–2005, online at http://www.ojp.usdoj.gov/bjs/homicide/tables/relationshiptab.htm (as visited June 23, 2008, and available in Clerk of Court's case file); Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Costs of Intimate Partner Violence Against Women in the United States 19 (2003); N. Websdale, Understanding Domestic Homicide 207 (1999); Lininger, Prosecuting Batterers after *Crawford*, 91 Va. L. Rev. 747, 751, 768–769 (2005).

Regardless of a defendant's purpose, threats, further violence, and ultimately murder can stop victims from testifying. See *id.*, at 769 (citing finding that batterers threaten retaliatory violence in as many as half of all cases, and 30 percent of batterers assault their victims again during the prosecution). A *constitutional* evidentiary requirement that insists upon a showing of purpose (rather than simply intent or probabilistic knowledge) may permit the domestic

partner who made the threats, caused the violence, or even murdered the victim to avoid conviction for earlier crimes by taking advantage of later ones.

In *Davis*, we recognized that "domestic violence" cases are "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." 547 U. S., at 832–833. We noted the concern that "[w]hen this occurs, the Confrontation Clause gives the criminal a windfall." *Id.*, at 833. And we replied to that concern by stating that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Ibid.* To the extent that it insists upon an additional showing of purpose, the Court breaks the promise implicit in those words and, in doing so, grants the defendant not fair treatment, but a windfall. I can find no history, no underlying purpose, no administrative consideration, and no constitutional principle that requires this result.

Insofar as JUSTICE SOUTER's rule in effect presumes "purpose" based on no more than evidence of a history of domestic violence, I agree with it. In all other respects, however, I must respectfully dissent.

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KENNEDY *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 07–343. Argued April 16, 2008—Decided June 25, 2008; modified October 1, 2008

Louisiana charged petitioner with the aggravated rape of his then-8-year-old stepdaughter. He was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12. The State Supreme Court affirmed, rejecting petitioner's reliance on *Coker* v. *Georgia*, 433 U. S. 584, which barred the use of the death penalty as punishment for the rape of an adult woman but left open the question which, if any, other nonhomicide crimes can be punished by death consistent with the Eighth Amendment. Reasoning that children are a class in need of special protection, the state court held child rape to be unique in terms of the harm it inflicts upon the victim and society and concluded that, short of first-degree murder, there is no crime more deserving of death. The court acknowledged that petitioner would be the first person executed since the state law was amended to authorize the death penalty for child rape in 1995, and that Louisiana is in the minority of jurisdictions authorizing death for that crime. However, emphasizing that four more States had capitalized child rape since 1995 and at least eight others had authorized death for other nonhomicide crimes, as well as that, under *Roper* v. *Simmons*, 543 U. S. 551, and *Atkins* v. *Virginia*, 536 U. S. 304, it is the direction of change rather than the numerical count that is significant, the court held petitioner's death sentence to be constitutional.

Held: The Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. Pp. 419–447.

1. The Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101. The standard for extreme cruelty "itself remains the same, but its applicability must change as the basic mores of society change." *Furman* v. *Georgia*, 408 U. S. 238, 382. Under the precept of justice that punishment is to be graduated and proportioned to the crime, informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execu-

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tion.'" *Roper*, *supra*, at 568. Applying this principle, the Court held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons violates the Eighth Amendment because the offender has a diminished personal responsibility for the crime. The Court also has found the death penalty disproportionate to the crime itself where the crime did not result, or was not intended to result, in the victim's death. See, *e. g.*, *Coker*, *supra*; *Enmund* v. *Florida*, 458 U. S. 782. In making its determination, the Court is guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*, *supra*, at 563. Consensus is not dispositive, however. Whether the death penalty is disproportionate to the crime also depends on the standards elaborated by controlling precedents and on the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. Pp. 419–421.

2. A review of the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrates a national consensus against capital punishment for the crime of child rape. Pp. 422–434.

(a) The Court follows the approach of cases in which objective indicia of consensus demonstrated an opinion against the death penalty for juveniles, see *Roper*, *supra*, mentally retarded offenders, see *Atkins*, *supra*, and vicarious felony murderers, see *Enmund*, *supra*. Thirty-seven jurisdictions—36 States plus the Federal Government—currently impose capital punishment, but only 6 States authorize it for child rape. In 45 jurisdictions, by contrast, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 in *Enmund* that prohibited the death penalty under the circumstances those cases considered. Pp. 422–426.

(b) Respondent's argument that *Coker*'s general discussion contrasting murder and rape, 433 U. S., at 598, has been interpreted too expansively, leading some States to conclude that *Coker* applies to child rape when in fact it does not, is unsound. *Coker*'s holding was narrower than some of its language read in isolation indicates. The *Coker* plurality framed the question as whether, "with respect to rape of an adult woman," the death penalty is disproportionate punishment, *id.*, at 592, and it repeated the phrase "adult woman" or "adult female" eight times in discussing the crime or the victim. The distinction between adult and child rape was not merely rhetorical; it was central to *Coker*'s reasoning, including its analysis of legislative consensus. See, *e. g.*, *id.*, at 595–596. There is little evidence to support respondent's contention that state legislatures have understood *Coker* to state a broad rule that

covers minor victims, and state courts have uniformly concluded that *Coker* did not address that crime. Accordingly, the small number of States that have enacted the death penalty for child rape is relevant to determining whether there is a consensus against capital punishment for the rape of a child. Pp. 426–431.

(c) A consistent direction of change in support of the death penalty for child rape might counterbalance an otherwise weak demonstration of consensus, see, *e. g.*, *Atkins*, 536 U. S., at 315, but no showing of consistent change has been made here. That five States may have had pending legislation authorizing death for child rape is not dispositive because it is not this Court's practice, nor is it sound, to find contemporary norms based on legislation proposed but not yet enacted. Indeed, since the parties submitted their briefs, the legislation in at least two of the five States has failed. Further, evidence that, in the last 13 years, six new death penalty statutes have been enacted, three in the last two years, is not as significant as the data in *Atkins*, where 18 States between 1986 and 2001 had enacted legislation prohibiting the execution of mentally retarded persons. See *id.*, at 314–315. Respondent argues that this case is like *Roper* because, there, only five States had shifted their positions between 1989 and 2005, one less State than here. See 543 U. S., at 565. But the *Roper* Court emphasized that the slow pace of abolition was counterbalanced by the total number of States that had recognized the impropriety of executing juvenile offenders. See *id.*, at 566–567. Here, the fact that only six States have made child rape a capital offense is not an indication of a trend or change in direction comparable to the one in *Roper*. The evidence bears a closer resemblance to that in *Enmund*, where the Court found a national consensus against death for vicarious felony murder despite eight jurisdictions having authorized it. See 458 U. S., at 789, 792. Pp. 431–433.

(d) Execution statistics also confirm that there is a social consensus against the death penalty for child rape. Nine States have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 *Furman* decision and today; yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963. Louisiana is the only State since 1964 that has sentenced an individual to death for child rape, and petitioner and another man so sentenced are the only individuals now on death row in the United States for nonhomicide offenses. Pp. 433–434.

3. Informed by its own precedents and its understanding of the Constitution and the rights it secures, the Court concludes, in its independent judgment, that the death penalty is not a proportional punishment for the crime of child rape. Pp. 434–446.

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(a) The Court's own judgment should be brought to bear on the death penalty's acceptability under the Eighth Amendment. See, *e. g.*, *Coker*, *supra*, at 597. Rape's permanent and devastating impact on a child suggests moral grounds for questioning a rule barring capital punishment simply because the crime did not result in the victim's death, but it does not follow that death is a proportionate penalty for child rape. The constitutional prohibition against excessive or cruel and unusual punishments mandates that punishment "be exercised within the limits of civilized standards." *Trop*, 356 U. S., at 99–100. Evolving standards of decency counsel the Court to be most hesitant before allowing extension of the death penalty, especially where no life was taken in the commission of the crime. See, *e. g.*, *Coker*, *supra*, at 597–598; *Enmund*, *supra*, at 797. Consistent with those evolving standards and the teachings of its precedents, the Court concludes that there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individuals, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public," they cannot compare to murder in their "severity and irrevocability," 433 U. S., at 598. The Court finds significant the substantial number of executions that would be allowed for child rape under respondent's approach. Although narrowing aggravators might be used to ensure the death penalty's restrained application in this context, as they are in the context of capital murder, all such standards have the potential to result in some inconsistency of application. The Court, for example, has acknowledged that the requirement of general rules to ensure consistency of treatment, see, *e. g.*, *Godfrey* v. *Georgia*, 446 U. S. 420, and the insistence that capital sentencing be individualized, see, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280, have resulted in tension and imprecision. This approach might be sound with respect to capital murder, but it should not be introduced into the justice system where death has not occurred. The Court has spent more than 32 years developing a foundational jurisprudence for capital murder to guide the States and juries in imposing the death penalty. Beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of death. Pp. 434–441.

(b) The Court's decision is consistent with the justifications offered for the death penalty, retribution and deterrence, see, *e. g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 183. Among the factors for determining whether retribution is served, the Court must look to whether the death penalty balances the wrong to the victim in nonhomicide cases.

Syllabus

Cf. *Roper*, *supra*, at 571. It is not at all evident that the child rape victim's hurt is lessened when the law permits the perpetrator's death, given that capital cases require a long-term commitment by those testifying for the prosecution. Society's desire to inflict death for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. There are also relevant systemic concerns in prosecuting child rape, including the documented problem of unreliable, induced, and even imagined child testimony, which creates a "special risk of wrongful execution" in some cases. Cf. *Atkins*, *supra*, at 321. As to deterrence, the evidence suggests that the death penalty may not result in more effective enforcement, but may add to the risk of nonreporting of child rape out of fear of negative consequences for the perpetrator, especially if he is a family member. And, by in effect making the punishment for child rape and murder equivalent, a State may remove a strong incentive for the rapist not to kill his victim. Pp. 441–446.

4. The concern that the Court's holding will effectively block further development of a consensus favoring the death penalty for child rape overlooks the principle that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society," *Trop*, *supra*, at 101. Confirmed by the Court's repeated, consistent rulings, this principle requires that resort to capital punishment be restrained, limited in its instances of application, and reserved for the worst of crimes, those that, in the case of crimes against individuals, take the victim's life. Pp. 446–447.

957 So. 2d 757, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 447.

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *Pamela S. Karlan*, *Jelpi P. Picou*, *G. Ben Cohen*, and *Martin A. Stern*.

Juliet L. Clark argued the cause for respondent. With her on the brief were *Paul D. Connick, Jr.*, and *Terry M. Boudreaux*.

R. Ted Cruz, Solicitor General of Texas, argued the cause for the State of Texas et al. as *amici curiae* in support of

respondent. With him on the brief were *Greg Abbott*, Attorney General of Texas, *Kent C. Sullivan*, First Assistant Attorney General, *Eric J. R. Nichols*, Deputy Attorney General for Criminal Justice, *Philip A. Lionberger*, Assistant Solicitor General, *Troy King*, Attorney General of Alabama, *Jim Davis* and *Will Parker*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *John W. Suthers* of Colorado, *Lawrence G. Wasden* of Idaho, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *W. A. Drew Edmondson* of Oklahoma, *Henry D. McMaster* of South Carolina, and *Robert M. McKenna* of Washington.*

JUSTICE KENNEDY delivered the opinion of the Court.

The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection. See Amdts. 8 and 14, § 1; *Robinson* v. *California*, 370 U. S. 660 (1962). Patrick Kennedy, the petitioner here, seeks to set aside his death sentence under the Eighth Amendment. He was charged by the respondent, the State of Louisiana, with the aggravated rape of his then-8-year-old stepdaughter. After a jury trial petitioner was convicted

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *John Holdridge*, *Theodore M. Shaw*, *Jacqueline A. Berrien*, *Christina Swarns*, *Steven R. Shapiro*, and *Dennis D. Parker*; for the Louisiana Association of Criminal Defense Lawyers et al. by *Paul R. Baier*; for the National Association of Criminal Defense Lawyers et al. by *Stuart F. Delery* and *Barbara E. Bergman*; and for the National Association of Social Workers et al. by *David M. Gossett*, *Carolyn I. Polowy*, and *Joseph Thai*.

Christopher Landau and *Nathan Mammen* filed a brief for Missouri Governor Matt Blunt et al. as *amici curiae* urging affirmance.

Sandra L. Babcock filed a brief for Leading British Law Associations et al. as *amici curiae*.

and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12 years of age. See La. Stat. Ann. § 14:42 (West 1997 and Supp. 1998). This case presents the question whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. We hold the Eighth Amendment prohibits the death penalty for this offense. The Louisiana statute is unconstitutional.

I

Petitioner's crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death. At 9:18 a.m. on March 2, 1998, petitioner called 911 to report that his stepdaughter, referred to here as L. H., had been raped. He told the 911 operator that L. H. had been in the garage while he readied his son for school. Upon hearing loud screaming, petitioner said, he ran outside and found L. H. in the side yard. Two neighborhood boys, petitioner told the operator, had dragged L. H. from the garage to the yard, pushed her down, and raped her. Petitioner claimed he saw one of the boys riding away on a blue 10-speed bicycle.

When police arrived at petitioner's home between 9:20 and 9:30 a.m., they found L. H. on her bed, wearing a T-shirt and wrapped in a bloody blanket. She was bleeding profusely from the vaginal area. Petitioner told police he had carried her from the yard to the bathtub and then to the bed. Consistent with this explanation, police found a thin line of blood drops in the garage on the way to the house and then up the stairs. Once in the bedroom, petitioner had used a basin of water and a cloth to wipe blood from the victim. This later prevented medical personnel from collecting a reliable DNA sample.

L. H. was transported to the Children's Hospital. An expert in pediatric forensic medicine testified that L. H.'s injuries were the most severe he had seen from a sexual assault in his four years of practice. A laceration to the left wall of the vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure. Her entire perineum was torn from the posterior fourchette to the anus. The injuries required emergency surgery.

At the scene of the crime, at the hospital, and in the first weeks that followed, both L. H. and petitioner maintained in their accounts to investigators that L. H. had been raped by two neighborhood boys. One of L. H.'s doctors testified at trial that L. H. told all hospital personnel the same version of the rape, although she reportedly told one family member that petitioner raped her. L. H. was interviewed several days after the rape by a psychologist. The interview was videotaped, lasted three hours over two days, and was introduced into evidence at trial. On the tape one can see that L. H. had difficulty discussing the subject of the rape. She spoke haltingly and with long pauses and frequent movement. Early in the interview, L. H. expressed reservations about the questions being asked:

> "I'm going to tell the same story. They just want me to change it. . . . They want me to say my Dad did it. . . . I don't want to say it. . . . I tell them the same, same story." Def. Exh. D–7, 01:29:07–:36.

She told the psychologist that she had been playing in the garage when a boy came over and asked her about Girl Scout cookies she was selling; and that the boy "pulled [her by the legs to] the backyard," *id.*, at 01:47:41–:52, where he placed his hand over her mouth, "pulled down [her] shorts," Def. Exh. D–8, 00:03:11–:12, and raped her, *id.*, at 00:14:39–:40.

Eight days after the crime, and despite L. H.'s insistence that petitioner was not the offender, petitioner was arrested

for the rape. The State's investigation had drawn the accuracy of petitioner and L. H.'s story into question. Though the defense at trial proffered alternative explanations, the case for the prosecution, credited by the jury, was based upon the following evidence: An inspection of the side yard immediately after the assault was inconsistent with a rape having occurred there, the grass having been found mostly undisturbed but for a small patch of coagulated blood. Petitioner said that one of the perpetrators fled the crime scene on a blue 10-speed bicycle but gave inconsistent descriptions of the bicycle's features, such as its handlebars. Investigators found a bicycle matching petitioner and L. H.'s description in tall grass behind a nearby apartment, and petitioner identified it as the bicycle one of the perpetrators was riding. Yet its tires were flat, it did not have gears, and it was covered in spider webs. In addition police found blood on the underside of L. H.'s mattress. This convinced them the rape took place in her bedroom, not outside the house.

Police also found that petitioner made four telephone calls on the morning of the rape. Sometime before 6:15 a.m., petitioner called his employer and left a message that he was unavailable to work that day. Petitioner called back between 6:30 and 7:30 a.m. to ask a colleague how to get blood out of a white carpet because his daughter had "'just become a young lady.'" Brief for Respondent 12. At 7:37 a.m., petitioner called B & B Carpet Cleaning and requested urgent assistance in removing bloodstains from a carpet. Petitioner did not call 911 until about an hour and a half later.

About a month after petitioner's arrest L. H. was removed from the custody of her mother, who had maintained until that point that petitioner was not involved in the rape. On June 22, 1998, L. H. was returned home and told her mother for the first time that petitioner had raped her. And on December 16, 1999, about 21 months after the rape, L. H. recorded her accusation in a videotaped interview with the Child Advocacy Center.

The State charged petitioner with aggravated rape of a child under La. Stat. Ann. § 14:42 (West 1997 and Supp. 1998) and sought the death penalty. At all times relevant to petitioner's case, the statute provided:

> "A. Aggravated rape is a rape committed . . . where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> . . . . . .
>
> "(4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.
>
> . . . . . .
>
> "D. Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.
>
> "(1) However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section:
>
> "(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury."

(Since petitioner was convicted and sentenced, the statute has been amended to include oral intercourse within the definition of aggravated rape and to increase the age of the victim from 12 to 13. See La. Stat. Ann. § 14:42 (West Supp. 2007).)

Aggravating circumstances are set forth in La. Code Crim. Proc. Ann., Art. 905.4 (West 1997 Supp.). In pertinent part and at all times relevant to petitioner's case, the provision stated:

"A. The following shall be considered aggravating circumstances:

"(1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, or simple robbery.

. . . . .

"(10) The victim was under the age of twelve years or sixty-five years of age or older."

The trial began in August 2003. L. H. was then 13 years old. She testified that she "'woke up one morning and Patrick was on top of [her].'" She remembered petitioner bringing her "'[a] cup of orange juice and pills chopped up in it'" after the rape and overhearing him on the telephone saying she had become a "'young lady.'" 05–1981, pp. 12, 15, 16 (La. 5/22/07), 957 So. 2d 757, 767, 769, 770. L. H. acknowledged that she had accused two neighborhood boys but testified petitioner told her to say this and that it was untrue. *Id.*, at 769.

The jury having found petitioner guilty of aggravated rape, the penalty phase ensued. The State presented the testimony of S. L., who is the cousin and goddaughter of petitioner's ex-wife. S. L. testified that petitioner sexually abused her three times when she was eight years old and that the last time involved sexual intercourse. *Id.*, at 772. She did not tell anyone until two years later and did not pursue legal action.

The jury unanimously determined that petitioner should be sentenced to death. The Supreme Court of Louisiana affirmed. See *id.*, at 779–789, 793; see also *State* v. *Wilson*, 96–1392, 96–2076 (La. 12/13/96), 685 So. 2d 1063 (upholding the constitutionality of the death penalty for child rape). The court rejected petitioner's reliance on *Coker* v. *Georgia*, 433 U. S. 584 (1977), noting that, while *Coker* bars the use of

the death penalty as punishment for the rape of an adult woman, it left open the question which, if any, other nonhomicide crimes can be punished by death consistent with the Eighth Amendment. Because "'children are a class that need special protection,'" the state court reasoned, the rape of a child is unique in terms of the harm it inflicts upon the victim and our society. 957 So. 2d, at 781.

The court acknowledged that petitioner would be the first person executed for committing child rape since La. Stat. Ann. § 14:42 was amended in 1995 and that Louisiana is in the minority of jurisdictions that authorize the death penalty for the crime of child rape. But following the approach of *Roper* v. *Simmons*, 543 U. S. 551 (2005), and *Atkins* v. *Virginia*, 536 U. S. 304 (2002), it found significant not the "numerical counting of which [S]tates . . . stand for or against a particular capital prosecution," but "the direction of change." 957 So. 2d, at 783 (emphasis deleted). Since 1993, the court explained, four more States—Oklahoma, South Carolina, Montana, and Georgia—had capitalized the crime of child rape, and at least eight States had authorized capital punishment for other nonhomicide crimes. By its count, 14 of the then-38 States permitting capital punishment, plus the Federal Government, allowed the death penalty for nonhomicide crimes and 5 allowed the death penalty for the crime of child rape. See *id.*, at 785–786.

The state court next asked whether "child rapists rank among the worst offenders." *Id.*, at 788. It noted the severity of the crime; that the execution of child rapists would serve the goals of deterrence and retribution; and that, unlike in *Atkins* and *Roper*, there were no characteristics of petitioner that tended to mitigate his moral culpability. 957 So. 2d, at 788–789. It concluded: "[S]hort of first-degree murder, we can think of no other non-homicide crime more deserving [of capital punishment]." *Id.*, at 789.

On this reasoning the Supreme Court of Louisiana rejected petitioner's argument that the death penalty for the

rape of a child under 12 years is disproportionate and upheld the constitutionality of the statute. Chief Justice Calogero dissented. *Coker*, *supra*, and *Eberheart* v. *Georgia*, 433 U. S. 917 (1977), in his view, "set out a bright-line and easily administered rule" that the Eighth Amendment precludes capital punishment for any offense that does not involve the death of the victim. 957 So. 2d, at 794.

We granted certiorari. 552 U. S. 1087 (2008).

II

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins*, 536 U. S., at 311, n. 7. The Court explained in *Atkins*, *id.*, at 311, and *Roper*, *supra*, at 560, that the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." *Weems* v. *United States*, 217 U. S. 349, 367 (1910). Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that "currently prevail." *Atkins*, *supra*, at 311. The Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). This is because "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Furman* v. *Georgia*, 408 U. S. 238, 382 (1972) (Burger, C. J., dissenting).

Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule. See *Trop*, *supra*, at 100 (plurality opinion). As we shall discuss, punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. See *Harmelin* v. *Michigan*, 501 U. S. 957, 999 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also Part IV–B, *infra*. It is the last of these, retribution, that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.

For these reasons we have explained that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, *supra*, at 568 (quoting *Atkins*, *supra*, at 319). Though the death penalty is not invariably unconstitutional, see *Gregg* v. *Georgia*, 428 U. S. 153 (1976), the Court insists upon confining the instances in which the punishment can be imposed.

Applying this principle, we held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime. See *Roper*, *supra*, at 571–573; *Atkins*, *supra*, at 318, 320. The Court further has held that the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim. In *Coker*, 433 U. S. 584, for instance, the Court held it would be unconstitutional to execute an offender who had raped an adult woman. See also *Eberheart*, *supra* (holding

unconstitutional in light of *Coker* a sentence of death for the kidnaping and rape of an adult woman). And in *Enmund* v. *Florida*, 458 U. S. 782 (1982), the Court overturned the capital sentence of a defendant who aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place. On the other hand, in *Tison* v. *Arizona*, 481 U. S. 137 (1987), the Court allowed the defendants' death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.

In these cases the Court has been guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*, 543 U. S., at 563; see also *Coker*, *supra*, at 593–597 (plurality opinion) (finding that both legislatures and juries had firmly rejected the penalty of death for the rape of an adult woman); *Enmund*, 458 U. S., at 788 (looking to "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made"). The inquiry does not end there, however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. See *id.*, at 797–801; *Gregg*, *supra*, at 182–183 (joint opinion of Stewart, Powell, and STEVENS, JJ.); *Coker*, *supra*, at 597–600 (plurality opinion).

Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.

III

A

The existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in *Roper*, *Atkins*, *Coker*, and *Enmund*, and we follow the approach of those cases here. The history of the death penalty for the crime of rape is an instructive beginning point.

In 1925, 18 States, the District of Columbia, and the Federal Government had statutes that authorized the death penalty for the rape of a child or an adult. See *Coker*, *supra*, at 593 (plurality opinion). Between 1930 and 1964, 455 people were executed for those crimes. See 5 Historical Statistics of the United States: Earliest Times to the Present, pp. 5–262 to 5–263 (S. Carter et al. eds. 2006) (Table Ec343–357). To our knowledge the last individual executed for the rape of a child was Ronald Wolfe in 1964. See H. Frazier, Death Sentences in Missouri, 1803–2005: A History and Comprehensive Registry of Legal Executions, Pardons, and Commutations 143 (2006).

In 1972, *Furman* invalidated most of the state statutes authorizing the death penalty for the crime of rape; and in *Furman*'s aftermath only six States reenacted their capital rape provisions. Three States—Georgia, North Carolina, and Louisiana—did so with respect to all rape offenses. Three States—Florida, Mississippi, and Tennessee—did so with respect only to child rape. See *Coker*, *supra*, at 594–595 (plurality opinion). All six statutes were later invalidated under state or federal law. See *Coker*, *supra* (striking down Georgia's capital rape statute); *Woodson* v. *North Carolina*, 428 U. S. 280, 287, n. 6, 301–305 (1976) (plurality opinion) (striking down North Carolina's mandatory death penalty statute); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976) (striking down Louisiana's mandatory death penalty statute); *Collins* v. *State*, 550 S. W. 2d 643, 646 (Tenn. 1977) (striking down Tennessee's mandatory death penalty statute); *Buford*

v. *State*, 403 So. 2d 943, 951 (Fla. 1981) (holding unconstitutional the imposition of death for child rape); *Leatherwood* v. *State*, 548 So. 2d 389, 402–403 (Miss. 1989) (striking down the death penalty for child rape on state-law grounds).

Louisiana reintroduced the death penalty for rape of a child in 1995. See La. Stat. Ann. §14:42 (West Supp. 1996). Under the current statute, any anal, vaginal, or oral intercourse with a child under the age of 13 constitutes aggravated rape and is punishable by death. See §14:42 (West Supp. 2007). Mistake of age is not a defense, so the statute imposes strict liability in this regard. Five States have since followed Louisiana's lead: Georgia, see Ga. Code Ann. §16–6–1 (2007) (enacted 1999); Montana, see Mont. Code Ann. §45–5–503 (2007) (enacted 1997); Oklahoma, see Okla. Stat., Tit. 10, §7115(K) (West 2007 Supp.) (enacted 2006); South Carolina, see S. C. Code Ann. §16–3–655(C)(1) (Supp. 2007) (enacted 2006); and Texas, see Tex. Penal Code Ann. §12.42(c)(3) (West Supp. 2007) (enacted 2007); see also §22.021(a). Four of these States' statutes are more narrow than Louisiana's in that only offenders with a previous rape conviction are death eligible. See Mont. Code Ann. §45–5–503(3)(c); Okla. Stat., Tit. 10, §7115(K); S. C. Code Ann. §16–3–655(C)(1); Tex. Penal Code Ann. §12.42(c)(3). Georgia's statute makes child rape a capital offense only when aggravating circumstances are present, including but not limited to a prior conviction. See Ga. Code Ann. §17–10–30 (Supp. 2007).

By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse. See 108 Stat. 1972 (codified as amended in scattered sections of 18 U. S. C.). Under 18 U. S. C. §2245, an offender is death eligible only when the sexual abuse or exploitation results in the victim's death.

Petitioner claims the death penalty for child rape is not authorized in Georgia, pointing to a 1979 decision in which the Supreme Court of Georgia stated that "[s]tatutory rape is not a capital crime in Georgia." *Presnell* v. *State*, 243 Ga. 131, 132–133, 252 S. E. 2d 625, 626. But it appears *Presnell* was referring to the separate crime of statutory rape, which is not a capital offense in Georgia, see Ga. Code Ann. §26–2018 (1969); cf. §16–6–3 (2007). The State's current capital rape statute, by contrast, is explicit that the rape of "[a] female who is less than ten years of age" is punishable "by death." §§16–6–1(a)(2), (b). Based on a recent statement by the Supreme Court of Georgia it must be assumed that this law is still in force: "Neither the United States Supreme Court, nor this Court, has yet addressed whether the death penalty is unconstitutionally disproportionate for the crime of raping a child." *State* v. *Velazquez*, 283 Ga. 206, 208, 657 S. E. 2d 838, 840 (2008).

Respondent would include Florida among those States that permit the death penalty for child rape. The state statute does authorize, by its terms, the death penalty for "sexual battery upon . . . a person less than 12 years of age." Fla. Stat. §794.011(2) (2007); see also §921.141(5) (2007). In 1981, however, the Supreme Court of Florida held the death penalty for child sexual assault to be unconstitutional. See *Buford*, *supra*. It acknowledged that *Coker* addressed only the constitutionality of the death penalty for rape of an adult woman, 403 So. 2d, at 950, but held that "[t]he reasoning of the justices in *Coker* . . . compels [the conclusion] that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment," *id.*, at 951. Respondent points out that the state statute has not since been amended. Pursuant to Fla. Stat. §775.082(2) (2007), however, Florida state courts have understood *Buford* to bind their sentencing discretion in child rape cases. See, *e. g.*, *Gibson* v. *State*, 721 So. 2d 363,

367, and n. 2 (Fla. App. 1998) (deeming it irrelevant that "the Florida Legislature never changed the wording of the sexual battery statute"); *Cooper* v. *State*, 453 So. 2d 67 (Fla. App. 1984) ("After *Buford*, death was no longer a possible penalty in Florida for sexual battery"); see also Fla. Stat. § 775.082(2) ("In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court . . . the court having jurisdiction over a person previously sentenced to death for a capital felony . . . shall sentence such person to life imprisonment").

Definitive resolution of state-law issues is for the States' own courts, and there may be disagreement over the statistics. It is further true that some States, including States that have addressed the issue in just the last few years, have made child rape a capital offense. The summary recited here, however, does allow us to make certain comparisons with the data cited in the *Atkins*, *Roper*, and *Enmund* cases.

When *Atkins* was decided in 2002, 30 States, including 12 noncapital jurisdictions, prohibited the death penalty for mentally retarded offenders; 20 permitted it. See 536 U. S., at 313–315. When *Roper* was decided in 2005, the numbers disclosed a similar division among the States: 30 States prohibited the death penalty for juveniles, 18 of which permitted the death penalty for other offenders; and 20 States authorized it. See 543 U. S., at 564. Both in *Atkins* and in *Roper*, we noted that the practice of executing mentally retarded and juvenile offenders was infrequent. Only five States had executed an offender known to have an IQ below 70 between 1989 and 2002, see *Atkins*, *supra*, at 316; and only three States had executed a juvenile offender between 1995 and 2005, see *Roper*, *supra*, at 564–565.

The statistics in *Enmund* bear an even greater similarity to the instant case. There eight jurisdictions had authorized imposition of the death penalty solely for participation in a robbery during which an accomplice committed murder, see 458 U. S., at 789, and six defendants between 1954 and 1982

had been sentenced to death for felony murder where the defendant did not personally commit the homicidal assault, *id.*, at 794. These facts, the Court concluded, "weigh[ed] on the side of rejecting capital punishment for the crime." *Id.*, at 793.

The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty. As mentioned above, only six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.*

B

At least one difference between this case and our Eighth Amendment proportionality precedents must be addressed. Respondent and its *amici* suggest that some States have an "erroneous understanding of this Court's Eighth Amendment jurisprudence." Brief for Missouri Governor Matt Blunt et al. as *Amici Curiae* 10. They submit that the general propositions set out in *Coker*, contrasting murder and

*When issued and announced on June 25, 2008, the Court's decision neither noted nor discussed the military penalty for rape under the Uniform Code of Military Justice. See 10 U. S. C. §§856 (2000 ed.), 920 (2000 ed. and Supp. V); Manual for Courts-Martial, United States, Part IV, Art. 120, ¶ 45.f(1), p. IV–78 (2008). In a petition for rehearing respondent argues that the military penalty bears on our consideration of the question in this case. For the reasons set forth in the statement respecting the denial of rehearing, *post*, p. 946, we find that the military penalty does not affect our reasoning or conclusions.

rape, have been interpreted in too expansive a way, leading some state legislatures to conclude that *Coker* applies to child rape when in fact its reasoning does not, or ought not, apply to that specific crime.

This argument seems logical at first, but in the end it is unsound. In *Coker*, a four-Member plurality of the Court, plus Justice Brennan and Justice Marshall in concurrence, held that a sentence of death for the rape of a 16-year-old woman, who was a minor under Georgia law, see Ga. Code Ann. §74–104 (1973), yet was characterized by the Court as an adult, was disproportionate and excessive under the Eighth Amendment. See 433 U. S., at 593–600; see also *id.*, at 600 (Brennan, J., concurring in judgment); *ibid.* (Marshall, J., concurring in judgment). (The Court did not explain why the 16-year-old victim qualified as an adult, but it may be of some significance that she was married, had a home of her own, and had given birth to a son three weeks prior to the rape. See Brief for Petitioner in *Coker* v. *Georgia*, O. T. 1976, No. 75–5444, pp. 14–15.)

The plurality noted that only one State had a valid statute authorizing the death penalty for adult rape and that "in the vast majority of cases, at least 9 out of 10, juries ha[d] not imposed the death sentence." *Coker*, 433 U. S., at 597; see also *id.*, at 594 ("Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes—Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* and *Roberts*"). This "history and . . . objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman," *id.*, at 593, confirmed the Court's independent judgment that punishing adult rape by death was not proportional:

> "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury

> to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of . . . another person. The murderer kills; the rapist, if no more than that, does not. . . . We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' *Gregg* v. *Georgia*, 428 U. S., at 187, is an excessive penalty for the rapist who, as such, does not take human life." *Id.*, at 598 (footnote omitted).

Confined to this passage, *Coker*'s analysis of the Eighth Amendment is susceptible of a reading that would prohibit making child rape a capital offense. In context, however, *Coker*'s holding was narrower than some of its language read in isolation. The *Coker* plurality framed the question as whether, "with respect to rape of an adult woman," the death penalty is disproportionate punishment. *Id.*, at 592. And it repeated the phrase "an adult woman" or "an adult female" in discussing the act of rape or the victim of rape eight times in its opinion. See *Coker*, *supra*. The distinction between adult and child rape was not merely rhetorical; it was central to the Court's reasoning. The opinion does not speak to the constitutionality of the death penalty for child rape, an issue not then before the Court. In discussing the legislative background, for example, the Court noted:

> "Florida, Mississippi, and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult. The Tennessee statute has since been invalidated because the death sentence was mandatory. The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is

> a child. . . . [This] obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." *Id.*, at 595–596 (citation and footnote omitted).

Still, respondent contends, it is possible that state legislatures have understood *Coker* to state a broad rule that covers the situation of the minor victim as well. We see little evidence of this. Respondent cites no reliable data to indicate that state legislatures have read *Coker* to bar capital punishment for child rape and, for this reason, have been deterred from passing applicable death penalty legislation. In the absence of evidence from those States where legislation has been proposed but not enacted we refuse to speculate about the motivations and concerns of particular state legislators.

The position of the state courts, furthermore, to which state legislators look for guidance on these matters, indicates that *Coker* has not blocked the emergence of legislative consensus. The state courts that have confronted the precise question before us have been uniform in concluding that *Coker* did not address the constitutionality of the death penalty for the crime of child rape. See, *e. g.*, *Wilson*, 685 So. 2d, at 1066 (upholding the constitutionality of the death penalty for rape of a child and noting that "[t]he plurality [in *Coker*] took great pains in referring only to the rape of adult women throughout their opinion" (emphasis deleted)); *Upshaw* v. *State*, 350 So. 2d 1358, 1360 (Miss. 1977) ("In *Coker* the Court took great pains to limit its decision to the applicability of the death penalty for the rape of an adult woman. . . . As we view *Coker* the Court carefully refrained from deciding whether the death penalty for the rape of a female child under the age of twelve years is grossly disproportionate to the crime"). See also *Simpson* v. *Owens*, 207 Ariz. 261, 268, n. 8, 85 P. 3d 478, 485, n. 8 (App. 2004) (addressing the denial of bail for sexual offenses against children and noting that "[a]lthough the death penalty was declared in a plurality

opinion of the United States Supreme Court to be a disproportionate punishment for the rape of an adult woman . . . the rape of a child remains a capital offense in some states"); *People* v. *Hernandez*, 30 Cal. 4th 835, 869, 69 P. 3d 446, 466 (2003) (addressing the death penalty for conspiracy to commit murder and noting that "the constitutionality of laws imposing the death penalty for crimes not necessarily resulting in death is unresolved").

There is, to be sure, some contrary authority contained in various state-court opinions. But it is either dicta, see *State* v. *Barnum*, 921 So. 2d 513, 526 (Fla. 2005) (addressing the retroactivity of *Thompson* v. *State*, 695 So. 2d 691 (Fla. 1997)); *State* v. *Coleman*, 185 Mont. 299, 327, 605 P. 2d 1000, 1017 (1979) (upholding the defendant's death sentence for aggravated kidnaping); *State* v. *Gardner*, 947 P. 2d 630, 653 (Utah 1997) (addressing the constitutionality of the death penalty for prison assaults); equivocal in its conclusion, see *People* v. *Huddleston*, 212 Ill. 2d 107, 141, 816 N. E. 2d 322, 341–342 (2004) (citing law review articles for the proposition that the constitutionality of the death penalty for nonhomicide crimes "is the subject of debate"); or from a decision of a state intermediate court that has been superseded by a more specific statement of the law by the State's supreme court, compare, *e. g.*, *Parker* v. *State*, 216 Ga. App. 649, 650, n. 1, 455 S. E. 2d 360, 361, n. 1 (1995) (characterizing *Coker* as holding that the death penalty "is no longer permitted for rape where the victim is not killed"), with *Velazquez*, 283 Ga., at 208, 657 S. E. 2d, at 840 ("[T]he United States Supreme Court . . . has yet [to] addres[s] whether the death penalty is unconstitutionally disproportionate for the crime of raping a child").

The Supreme Court of Florida's opinion in *Buford* could be read to support respondent's argument. But even there the state court recognized that "[t]he [Supreme] Court has yet to decide whether [*Coker*'s rationale] holds true for the rape of a child" and made explicit that it was extending the

reasoning but not the holding of *Coker* in striking down the death penalty for child rape. 403 So. 2d, at 950, 951. The same is true of the Supreme Court of California's opinion in *Hernandez*, *supra*, at 867, 69 P. 3d, at 464.

We conclude on the basis of this review that there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional. The small number of States that have enacted this penalty, then, is relevant to determining whether there is a consensus against capital punishment for this crime.

C

Respondent insists that the six States where child rape is a capital offense, along with the States that have proposed but not yet enacted applicable death penalty legislation, reflect a consistent direction of change in support of the death penalty for child rape. Consistent change might counterbalance an otherwise weak demonstration of consensus. See *Atkins*, 536 U. S., at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change"); *Roper*, 543 U. S., at 565 ("Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded"). But whatever the significance of consistent change where it is cited to show emerging support for expanding the scope of the death penalty, no showing of consistent change has been made in this case.

Respondent and its *amici* identify five States where, in their view, legislation authorizing capital punishment for child rape is pending. See Brief for Missouri Governor Matt Blunt et al. as *Amici Curiae* 2, 14. It is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted. There are compelling reasons not to do so here. Since the briefs were submitted by the parties, legislation in two of the five States has failed. See, *e. g.*, S. 195, 66th Gen. Assembly, 2d Reg. Sess. (Colo. 2008) (rejected by Senate Appro-

priations Committee on Apr. 11, 2008); S. 2596, 2008 Leg., Reg. Sess. (Miss. 2008) (rejected by House Committee on Mar. 18, 2008). In Tennessee, the House bills were rejected almost a year ago, and the Senate bills appear to have died in committee. See H. R. 601, 105th Gen. Assembly, 1st Reg. Sess. (2007) (taken off Subcommittee calendar on Apr. 4, 2007); H. R. 662, *ibid.* (failed for lack of second on Mar. 21, 2007); H. R. 1099, *ibid.* (taken off notice for Judiciary Committee calendar on May 16, 2007); S. 22, *ibid.* (referred to General Subcommittee of Senate Finance, Ways, and Means Committee on June 11, 2007); S. 157, *ibid.* (referred to Senate Judiciary Committee on Feb. 7, 2007; action deferred until Jan. 2008); S. 841, *ibid.* (referred to General Subcommittee of Senate Judiciary Committee on Mar. 27, 2007). In Alabama, the recent legislation is similar to a bill that failed in 2007. Compare H. R. 456, 2008 Leg., Reg. Sess. (2008), with H. R. 335, 2007 Leg., Reg. Sess. (2007). And in Missouri, the 2008 legislative session has ended, tabling the pending legislation. See Mo. Const., Art. III, § 20(a).

Aside from pending legislation, it is true that in the last 13 years there has been change toward making child rape a capital offense. This is evidenced by six new death penalty statutes, three enacted in the last two years. But this showing is not as significant as the data in *Atkins*, where 18 States between 1986 and 2001 had enacted legislation prohibiting the execution of mentally retarded persons. See *Atkins*, *supra*, at 313–315. Respondent argues the instant case is like *Roper* because, there, only five States had shifted their positions between 1989 and 2005, one less State than here. See *Roper*, *supra*, at 565. But in *Roper*, we emphasized that, though the pace of abolition was not as great as in *Atkins*, it was counterbalanced by the total number of States that had recognized the impropriety of executing juvenile offenders. See 543 U. S., at 566–567. When we decided *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), 12 death

penalty States already prohibited the execution of any juvenile under 18, and 15 prohibited the execution of any juvenile under 17. See *Roper*, *supra*, at 566–567 ("If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier"). Here, the total number of States to have made child rape a capital offense after *Furman* is six. This is not an indication of a trend or change in direction comparable to the one supported by data in *Roper*. The evidence here bears a closer resemblance to the evidence of state activity in *Enmund*, where we found a national consensus against the death penalty for vicarious felony murder despite eight jurisdictions having authorized the practice. See 458 U. S., at 789, 792.

D

There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society. See, *e. g.*, *id.*, at 794–795; *Roper*, *supra*, at 564–565; *Atkins*, *supra*, at 316; cf. *Coker*, 433 U. S., at 596–597 (plurality opinion). These statistics confirm our determination from our review of state statutes that there is a social consensus against the death penalty for the crime of child rape.

Nine States—Florida, Georgia, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, Tennessee, and Texas—have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 decision in *Furman* and today. See *supra*, at 422–423; *Coker*, *supra*, at 595 (plurality opinion). Yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963. See Historical Statistics of the United States, at 5–262 to 5–263 (Table Ec343–357). Cf. *Thompson* v. *Oklahoma*, 487 U. S. 815, 852–853 (1988) (O'Connor, J., concurring

in judgment) (that "four decades have gone by since the last execution of a defendant who was younger than 16 at the time of the offense . . . support[s] the inference of a national consensus opposing the death penalty for 15-year-olds").

Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape; and petitioner and Richard Davis, who was convicted and sentenced to death for the aggravated rape of a 5-year-old child by a Louisiana jury in December 2007, see *State* v. *Davis*, Case No. 262,971 (1st Jud. Dist., Caddo Parish, La.) (cited in Brief for Respondent 42, and n. 38), are the only two individuals now on death row in the United States for a nonhomicide offense.

After reviewing the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, we conclude there is a national consensus against capital punishment for the crime of child rape.

IV

A

As we have said in other Eighth Amendment cases, objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, but it does not end our inquiry. "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker*, *supra*, at 597 (plurality opinion); see also *Roper*, *supra*, at 563; *Enmund*, *supra*, at 797 ("[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty"). We turn, then, to the resolution of the question before us, which is informed by our precedents and our own understanding of the Constitution and the rights it secures.

It must be acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death. These facts illustrate the point. Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood. For this reason, we should be most reluctant to rely upon the language of the plurality in *Coker*, which posited that, for the victim of rape, "life may not be nearly so happy as it was," but it is not beyond repair. 433 U. S., at 598. Rape has a permanent psychological, emotional, and sometimes physical impact on the child. See C. Bagley & K. King, Child Sexual Abuse: The Search for Healing 2–24, 111–112 (1990); Finkelhor & Browne, Assessing the Long-Term Impact of Child Sexual Abuse: A Review and Conceptualization, in Handbook on Sexual Abuse of Children 55–60 (L. Walker ed. 1988). We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

It does not follow, though, that capital punishment is a proportionate penalty for the crime. The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish "be exercised within the limits of civilized standards." *Trop*, 356 U. S., at 99, 100 (plurality opinion). Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment. See *id.*, at 100.

To date the Court has sought to define and implement this principle, for the most part, in cases involving capital murder. One approach has been to insist upon general rules that ensure consistency in determining who receives a death sentence. See *California* v. *Brown*, 479 U. S. 538, 541 (1987) ("[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion" (citing *Gregg*, 428 U. S. 153; *Furman*, 408 U. S. 238)); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion) (requiring a State to give narrow and precise definition to the aggravating factors that warrant its imposition). At the same time the Court has insisted, to ensure restraint and moderation in use of capital punishment, on judging the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U. S., at 304 (plurality opinion); *Lockett* v. *Ohio*, 438 U. S. 586, 604–605 (1978) (plurality opinion).

The tension between general rules and case-specific circumstances has produced results not altogether satisfactory. See *Tuilaepa* v. *California*, 512 U. S. 967, 973 (1994) ("The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time"); *Walton* v. *Arizona*, 497 U. S. 639, 664–665 (1990) (SCALIA, J., concurring in part and concurring in judgment) ("The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve"). This has led some Members of the Court to say we should cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude. See *id.*, at 667–673 (advocating that the Court adhere to the *Furman* line of cases and abandon the *Woodson*-*Lockett* line of cases). For others the failure to limit these same imprecisions by stricter enforcement of narrowing

rules has raised doubts concerning the constitutionality of capital punishment itself. See *Baze* v. *Rees*, 553 U. S. 35, 82–86 (2008) (STEVENS, J., concurring in judgment); *Furman*, *supra*, at 310–314 (White, J., concurring); *Callins* v. *Collins*, 510 U. S. 1141, 1144–1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed. See *Gregg*, *supra*, at 187, 184 (joint opinion of Stewart, Powell, and STEVENS, JJ.) (because "death as a punishment is unique in its severity and irrevocability," capital punishment must be reserved for those crimes that are "so grievous an affront to humanity that the only adequate response may be the penalty of death" (citing in part *Furman*, 408 U. S., at 286–291 (Brennan, J., concurring); *id.*, at 306 (Stewart, J., concurring))); see also *Roper*, 543 U. S., at 569 (the Eighth Amendment requires that "the death penalty is reserved for a narrow category of crimes and offenders").

Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken. We said in *Coker* of adult rape:

> "We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim . . . . Short of homicide, it is the 'ultimate violation of self.' . . . [But] [t]he murderer kills; the rapist, if no more than that, does not. . . . We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevo-

> cability,' is an excessive penalty for the rapist who, as such, does not take human life." 433 U. S., at 597–598 (plurality opinion) (citation omitted).

The same distinction between homicide and other serious violent offenses against the individual informed the Court's analysis in *Enmund*, 458 U. S. 782, where the Court held that the death penalty for the crime of vicarious felony murder is disproportionate to the offense. The Court repeated there the fundamental, moral distinction between a "murderer" and a "robber," noting that while "robbery is a serious crime deserving serious punishment," it is not like death in its "severity and irrevocability." *Id.*, at 797 (internal quotation marks omitted).

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public," *Coker*, 433 U. S., at 598 (plurality opinion), they cannot be compared to murder in their "severity and irrevocability." *Ibid.*

In reaching our conclusion we find significant the number of executions that would be allowed under respondent's approach. The crime of child rape, considering its reported incidents, occurs more often than first-degree murder. Approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005; this is almost twice the total incidents of intentional murder for victims of all ages (3,405) reported during the same period. See Inter-University Consortium for Political and Social Research, National Incident-Based Reporting System, 2005, Study No. 4720, online at http://www.icpsr.umich.edu (as visited June 12, 2008, and available in Clerk of Court's

case file). Although we have no reliable statistics on convictions for child rape, we can surmise that, each year, there are hundreds, or more, of these convictions just in jurisdictions that permit capital punishment. Cf. Brief for Louisiana Association of Criminal Defense Lawyers et al. as *Amici Curiae* 1–2, and n. 2 (noting that there are now at least 70 capital rape indictments pending in Louisiana and estimating the actual number to be over 100). As a result of existing rules, see generally *Godfrey*, 446 U. S., at 428–433 (plurality opinion), only 2.2% of convicted first-degree murderers are sentenced to death, see Blume, Eisenberg, & Wells, Explaining Death Row's Population and Racial Composition, 1 J. of Empirical Legal Studies 165, 171 (2004). But under respondent's approach, the 36 States that permit the death penalty could sentence to death all persons convicted of raping a child less than 12 years of age. This could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty.

It might be said that narrowing aggravators could be used in this context, as with murder offenses, to ensure the death penalty's restrained application. We find it difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way. Even were we to forbid, say, the execution of first-time child rapists, see *supra*, at 422–423, or require as an aggravating factor a finding that the perpetrator's instant rape offense involved multiple victims, the jury still must balance, in its discretion, those aggravating factors against mitigating circumstances. In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be "freakis[h]," *Furman*, *supra*, at 310 (Stewart, J., concurring). We cannot sanction this result when the harm to the victim, though grave, cannot be quantified in the same way as death of the victim.

It is not a solution simply to apply to this context the aggravating factors developed for capital murder. The Court has said that a State may carry out its obligation to ensure individualized sentencing in capital murder cases by adopting sentencing processes that rely upon the jury to exercise wide discretion so long as there are narrowing factors that have some "'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" *Tuilaepa*, 512 U. S., at 975 (quoting *Jurek* v. *Texas*, 428 U. S. 262, 279 (1976) (White, J., concurring in judgment)). The Court, accordingly, has upheld the constitutionality of aggravating factors ranging from whether the defendant was a "'cold-blooded, pitiless slayer,'" *Arave* v. *Creech*, 507 U. S. 463, 471–474 (1993), to whether the "'perpetrator inflict[ed] mental anguish or physical abuse before the victim's death,'" *Walton*, 497 U. S., at 654, to whether the defendant "'would commit criminal acts of violence that would constitute a continuing threat to society,'" *Jurek*, *supra*, at 269–270, 274–276 (joint opinion of Stewart, Powell, and STEVENS, JJ.). All of these standards have the potential to result in some inconsistency of application.

As noted above, the resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred.

Our concerns are all the more pronounced where, as here, the death penalty for this crime has been most infrequent. See Part III–D, *supra*. We have developed a foundational jurisprudence in the case of capital murder to guide the States and juries in imposing the death penalty. Starting with *Gregg*, 428 U. S. 153, we have spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has

been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure.

B

Our decision is consistent with the justifications offered for the death penalty. *Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes. See *id.*, at 173, 183, 187 (joint opinion of Stewart, Powell, and STEVENS, JJ.); see also *Coker*, 433 U. S., at 592 (plurality opinion) ("A punishment might fail the test on either ground").

As in *Coker*, here it cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function. See *id.*, at 593, n. 4 (concluding that the death penalty for rape might serve "legitimate ends of punishment" but nevertheless is disproportionate to the crime). Cf. *Gregg*, 428 U. S., at 185–186 (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[T]here is no convincing empirical evidence either supporting or refuting th[e] view [that the death penalty serves as a significantly greater deterrent than lesser penalties]. We may nevertheless assume safely that there are murderers . . . for whom . . . the death penalty undoubtedly is a significant deterrent"); *id.*, at 186 (the value of capital punishment, and its contribution to acceptable penological goals, typically is a "complex factual issue the resolution of which properly rests with the legislatures"). This argument does not overcome other objections, however. The incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunish-

ment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense.

The goal of retribution, which reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused, see *Atkins*, 536 U. S., at 319; *Furman*, *supra*, at 308 (Stewart, J., concurring), does not justify the harshness of the death penalty here. In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape. See Part IV–A, *supra*; *Coker*, *supra*, at 597–598 (plurality opinion).

There is an additional reason for our conclusion that imposing the death penalty for child rape would not further retributive purposes. In considering whether retribution is served, among other factors we have looked to whether capital punishment "has the potential . . . to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Panetti* v. *Quarterman*, 551 U. S. 930, 958 (2007). In considering the death penalty for nonhomicide offenses this inquiry necessarily also must include the question whether the death penalty balances the wrong to the victim. Cf. *Roper*, 543 U. S., at 571.

It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. Capital cases require a long-term commitment by those who testify for the prosecution, especially when guilt and sentencing determinations are in multiple proceedings. In cases like this the key testimony is not just from the family but from the victim herself. During formative years of her adolescence, made all the more daunting for having to come to terms with the brutality of her experience, L. H. was required to discuss the case at length with law enforcement personnel. In a public trial she was required to recount

once more all the details of the crime to a jury as the State pursued the death of her stepfather. Cf. G. Goodman et al., Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims 50, 62, 72 (1992); Brief for National Association of Social Workers et al. as *Amici Curiae* 17–21. And in the end the State made L. H. a central figure in its decision to seek the death penalty, telling the jury in closing statements: "[L. H.] is asking you, asking you to set up a time and place when he dies." Tr. 121 (Aug. 26, 2003).

Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. The way the death penalty here involves the child victim in its enforcement can compromise a decent legal system; and this is but a subset of fundamental difficulties capital punishment can cause in the administration and enforcement of laws proscribing child rape.

There are, moreover, serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a "special risk of wrongful execution" in some child rape cases. *Atkins*, *supra*, at 321. See also Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 5–17. This undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment. Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement. See Ceci & Friedman, The Suggestibility of Children: Scientific Research and Legal Implications, 86 Cornell L. Rev. 33, 47 (2000) (there is "strong evidence that children, especially young children, are suggestible to a significant degree—even on abuse-related questions"); Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the

United States 1989 Through 2003, 95 J. Crim. L. & C. 523, 539 (2005) (discussing allegations of abuse at the Little Rascals Day Care Center); see also Quas, Davis, Goodman, & Myers, Repeated Questions, Deception, and Children's True and False Reports of Body Touch, 12 Child Maltreatment 60, 61–66 (2007) (finding that 4- to 7-year-olds "were able to maintain [a] lie about body touch fairly effectively when asked repeated, direct questions during a mock forensic interview").

Similar criticisms pertain to other cases involving child witnesses; but child rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed. See *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 60 (1987). Cf. Goodman, *supra*, at 118. And the question in a capital case is not just the fact of the crime, including, say, proof of rape as distinct from abuse short of rape, but details bearing upon brutality in its commission. These matters are subject to fabrication or exaggeration, or both. See Ceci & Friedman, *supra;* Quas, *supra*. Although capital punishment does bring retribution, and the legislature here has chosen to use it for this end, its judgment must be weighed, in deciding the constitutional question, against the special risks of unreliable testimony with respect to this crime.

With respect to deterrence, if the death penalty adds to the risk of nonreporting, that, too, diminishes the penalty's objectives. Underreporting is a common problem with respect to child sexual abuse. See Hanson, Resnick, Saunders, Kilpatrick, & Best, Factors Related to the Reporting of Childhood Rape, 23 Child Abuse & Neglect 559, 564 (1999) (finding that about 88% of female rape victims under the age of 18 did not disclose their abuse to authorities); Smith et al., Delay in Disclosure of Childhood Rape: Results From a National Survey, 24 Child Abuse & Neglect 273, 278–279 (2000)

(finding that 72% of women raped as children disclosed their abuse to someone, but that only 12% of the victims reported the rape to authorities). Although we know little about what differentiates those who report from those who do not report, see Hanson, *supra*, at 561, one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member, see Goodman-Brown, Edelstein, Goodman, Jones, & Gordon, Why Children Tell: A Model of Children's Disclosure of Sexual Abuse, 27 Child Abuse & Neglect 525, 527–528 (2003); Smith, *supra*, at 283–284 (finding that, where there was a relationship between perpetrator and victim, the victim was likely to keep the abuse a secret for a longer period of time, perhaps because of a "greater sense of loyalty or emotional bond"); Hanson, *supra*, at 565–566, and Table 3 (finding that a "significantly greater proportion of reported than nonreported cases involved a stranger"); see also *Ritchie*, *supra*, at 60. The experience of the *amici* who work with child victims indicates that, when the punishment is death, both the victim and the victim's family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting. See Brief for National Association of Social Workers et al. as *Amici Curiae* 11–13. As a result, punishment by death may not result in more deterrence or more effective enforcement.

In addition, by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim. Assuming the offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime. See Rayburn, Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes, 78 St. John's L. Rev. 1119, 1159–1160 (2004). It might be ar-

gued that, even if the death penalty results in a marginal increase in the incentive to kill, this is counterbalanced by a marginally increased deterrent to commit the crime at all. Whatever balance the legislature strikes, however, uncertainty on the point makes the argument for the penalty less compelling than for homicide crimes.

Each of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape. Taken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense. These considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the rape of a child.

V

Our determination that there is a consensus against the death penalty for child rape raises the question whether the Court's own institutional position and its holding will have the effect of blocking further or later consensus in favor of the penalty from developing. The Court, it will be argued, by the act of addressing the constitutionality of the death penalty, intrudes upon the consensus-making process. By imposing a negative restraint, the argument runs, the Court makes it more difficult for consensus to change or emerge. The Court, according to the criticism, itself becomes enmeshed in the process, part judge and part the maker of that which it judges.

These concerns overlook the meaning and full substance of the established proposition that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U. S., at 101 (plurality opinion). Confirmed by repeated, consistent rulings of this Court, this principle requires that use of the death penalty be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be

reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.

The judgment of the Supreme Court of Louisiana upholding the capital sentence is reversed. This case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The Court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be. The Court provides two reasons for this sweeping conclusion: First, the Court claims to have identified "a national consensus" that the death penalty is never acceptable for the rape of a child; second, the Court concludes, based on its "independent judgment," that imposing the death penalty for child rape is inconsistent with "'the evolving standards of decency that mark the progress of a maturing society.'" *Ante*, at 419, 426, 427. Because neither of these justifications is sound, I respectfully dissent.

I

A

I turn first to the Court's claim that there is "a national consensus" that it is never acceptable to impose the death penalty for the rape of a child. The Eighth Amendment's requirements, the Court writes, are "determined not by the standards that prevailed" when the Amendment was adopted but "by the norms that 'currently prevail.'" *Ante*, at 419 (quoting *Atkins* v. *Virginia*, 536 U. S. 304, 311 (2002)). In assessing current norms, the Court relies primarily on the fact that only 6 of the 50 States now have statutes that permit the death penalty for this offense. But this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents. As I will explain, dicta in this Court's decision in *Coker* v. *Georgia*, 433 U. S. 584 (1977), has stunted legislative consideration of the question whether the death penalty for the targeted offense of raping a young child is consistent with prevailing standards of decency. The *Coker* dicta gave state legislators and others good reason to fear that any law permitting the imposition of the death penalty for this crime would meet precisely the fate that has now befallen the Louisiana statute that is currently before us, and this threat strongly discouraged state legislators—regardless of their own values and those of their constituents—from supporting the enactment of such legislation.

As the Court correctly concludes, the *holding* in *Coker* was that the Eighth Amendment prohibits the death penalty for the rape of an "'adult woman,'" and thus *Coker* does not control our decision here. See *ante*, at 428. But the reasoning of the Justices in the majority had broader implications.

Two Members of the *Coker* majority, Justices Brennan and Marshall, took the position that the death penalty is always unconstitutional. 433 U. S., at 600 (Brennan, J., concurring in judgment), and *ibid.* (Marshall, J., concurring in judg-

ment). Four other Justices, who joined the controlling plurality opinion, suggested that the Georgia capital rape statute was unconstitutional for the simple reason that the impact of a rape, no matter how heinous, is not grievous enough to justify capital punishment. In the words of the plurality: "Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Id.*, at 598. The plurality summarized its position as follows: "We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life." *Ibid.*

The implications of the *Coker* plurality opinion were plain. Justice Powell, who concurred in the judgment overturning the death sentence in the case at hand, did not join the plurality opinion because he understood it to draw "a bright line between murder and all rapes—regardless of the degree of brutality of the rape or the effect upon the victim." *Id.*, at 603. If Justice Powell read *Coker* that way, it was reasonable for state legislatures to do the same.

Understandably, state courts have frequently read *Coker* in precisely this way. The Court is correct that state courts have generally understood the limited scope of the *holding* in *Coker*, *ante*, at 429–430, but lower courts and legislators also take into account—and I presume that this Court wishes them to continue to take into account—the Court's dicta. And that is just what happened in the wake of *Coker*. Four years after *Coker*, when Florida's capital child-rape statute was challenged, the Florida Supreme Court, while correctly noting that this Court had not *held* that the Eighth Amendment bars the death penalty for child rape, concluded that "[t]he reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel

and unusual punishment." *Buford* v. *State*, 403 So. 2d 943, 951 (1981).

Numerous other state courts have interpreted the *Coker* dicta similarly. See *State* v. *Barnum*, 921 So. 2d 513, 526 (Fla. 2005) (citing *Coker* as holding that "'a sentence of death is grossly disproportionate and excessive punishment for the crime of rape,'" not merely the rape of an adult woman); *People* v. *Huddleston*, 212 Ill. 2d 107, 141, 816 N. E. 2d 322, 341 (2004) (recognizing that "the constitutionality of state statutes that impose the death penalty for nonhomicide crimes is the subject of debate" after *Coker*); *People* v. *Hernandez*, 30 Cal. 4th 835, 867, 69 P. 3d 446, 464–467 (2003) (*Coker* "rais[ed] serious doubts that the federal Constitution permitted the death penalty for any offense not requiring the actual taking of human life" because "[a]lthough the high court did not expressly hold [in *Coker*] that the Eighth Amendment prohibits capital punishment for *all* crimes not resulting in death, the plurality stressed that the crucial difference between rape and murder is that a rapist 'does not take human life'"); *State* v. *Gardner*, 947 P. 2d 630, 653 (Utah 1997) ("The *Coker* holding leaves no room for the conclusion that any rape, even an 'inhuman' one involving torture and aggravated battery but not resulting in death, would constitutionally sustain imposition of the death penalty"); *Parker* v. *State*, 216 Ga. App. 649, n. 1, 455 S. E. 2d 360, 361, n. 1 (1995) (citing *Coker* for the proposition that the death penalty "is no longer permitted for rape where the victim is not killed"); *Leatherwood* v. *State*, 548 So. 2d 389, 406 (Miss. 1989) (Robertson, J., concurring) ("There is as much chance of the Supreme Court sanctioning death as a penalty for *any* non-fatal rape as the proverbial snowball enjoys in the nether regions"); *State* v. *Coleman*, 185 Mont. 299, 327–328, 605 P. 2d 1000, 1017 (1979) (stating that "[t]he decision of the Court in *Coker v. Georgia* is relevant only to crimes for which the penalty has been imposed which did *not* result in

the loss of a life" (citations omitted)); *Boyer* v. *State*, 240 Ga. 170, 240 S. E. 2d 68 (1977) *(per curiam)* (stating that "[s]ince death to the victim did not result . . . the death penalty for rape must be set aside"); see also 05–1981 (La. 5/22/07), 957 So. 2d 757, 794 (case below) (Calogero, C. J., dissenting) (citing the comments of the *Coker* plurality and concluding that the Louisiana child-rape law cannot pass constitutional muster).[1]

For the past three decades, these interpretations have posed a very high hurdle for state legislatures considering the passage of new laws permitting the death penalty for the rape of a child. The enactment and implementation of any

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[1] Commentators have expressed similar views. See Fleming, Louisiana's Newest Capital Crime: The Death Penalty for Child Rape, 89 J. Crim. L. & C. 717, 727 (1999) (the *Coker* Court drew a line between "crimes which result in loss of life, and crimes which do not"); Bailey, Death Is Different, Even on the Bayou: The Disproportionality of Crime, 55 Wash. & Lee L. Rev. 1335, 1357 (1998) (noting that "[m]any post-Coker cases interpreting the breadth of *Coker*'s holding suggest that the Mississippi Supreme Court's narrow reading of *Coker* in Upshaw is a minority position"); Matura, When Will It Stop? The Use of the Death Penalty for Non-homicide Crimes, 24 J. Legis. 249, 255 (1998) (stating that the *Coker* Court did not "draw a distinction between the rape of an adult woman and the rape of a minor"); Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 Cornell L. Rev. 989, 1009, n. 74 (1996) (stating that courts generally understand *Coker* to prohibit death sentences for crimes other than murder); Nanda, Recent Developments in the United States and Internationally Regarding Capital Punishment—An Appraisal, 67 St. John's L. Rev. 523, 532 (1993) (finding that *Coker* stands for the proposition that a death sentence is excessive when the victim is not killed); Ellis, Guilty but Mentally Ill and the Death Penalty: Punishment Full of Sound and Fury, Signifying Nothing, 43 Duke L. J. 87, 94 (1994) (referencing *Coker* to require capital offenses to be defined by unjustified human death); Dingerson, Reclaiming the Gavel: Making Sense Out of the Death Penalty Debate in State Legislatures, 18 N. Y. U. Rev. L. & Soc. Change 873, 878 (1991) (stating that *Coker* "ruled that the imposition of the death penalty for crimes from which no death results violates the cruel and unusual punishment provision of the eighth amendment" and that "[n]o subsequent Supreme Court decision has challenged this precedent").

new state death penalty statute—and particularly a new type of statute such as one that specifically targets the rape of young children—imposes many costs. There is the burden of drafting an innovative law that must take into account this Court's exceedingly complex Eighth Amendment jurisprudence. Securing passage of controversial legislation may interfere in a variety of ways with the enactment of other bills on the legislative agenda. Once the statute is enacted, there is the burden of training and coordinating the efforts of those who must implement the new law. Capital prosecutions are qualitatively more difficult than noncapital prosecutions and impose special emotional burdens on all involved. When a capital sentence is imposed under the new law, there is the burden of keeping the prisoner on death row and the lengthy and costly project of defending the constitutionality of the statute on appeal and in collateral proceedings. And if the law is eventually overturned, there is the burden of new proceedings on remand. Moreover, conscientious state lawmakers, whatever their personal views about the morality of imposing the death penalty for child rape, may defer to this Court's dicta, either because they respect our authority and expertise in interpreting the Constitution or merely because they do not relish the prospect of being held to have violated the Constitution and contravened prevailing "standards of decency." Accordingly, the *Coker* dicta gave state legislators a strong incentive not to push for the enactment of new capital child-rape laws even though these legislators and their constituents may have believed that the laws would be appropriate and desirable.

B

The Court expresses doubt that the *Coker* dicta had this effect, but the skepticism is unwarranted. It would be quite remarkable if state legislators were not influenced by the considerations noted above. And although state legislatures typically do not create legislative materials like those

produced by Congress, there is evidence that proposals to permit the imposition of the death penalty for child rape were opposed on the ground that enactment would be futile and costly.

In Oklahoma, the opposition to the State's capital child-rape statute argued that *Coker* had already ruled the death penalty unconstitutional as applied to cases of rape. See Oklahoma State Senate News Release, Senator Nichols Targets Child Predators With Death Penalty, Child Abuse Response Team, May 26, 2006, online at http://www.oksenate.gov/news/press_releases/press_releases_2006/pr20060526dpv.html (all Internet materials as visited June 23, 2008, and available in Clerk of Court's case file). Likewise, opponents of South Carolina's capital child-rape law contended that the statute would waste state resources because it would undoubtedly be held unconstitutional. See The State, Death Penalty Plan in Spotlight: Attorney General To Advise Senate Panel on Proposal for Repeat Child Rapists, Mar. 28, 2006 (quoting Laura Hudson, spokeswoman for the S. C. Victim Assistance Network, as stating that "'[w]e don't need to be wasting state money to have an appeal to the [United States] Supreme Court, . . . knowing we are going to lose it'"). Representative Fletcher Smith of the South Carolina House of Representatives forecast that the bill would not meet constitutional standards because "death isn't involved." See Davenport, Emotion Drives Child Rape Death Penalty Debate in South Carolina, Associated Press, Apr. 4, 2006.

In Texas, opponents of that State's capital child-rape law argued that *Coker*'s reasoning doomed the proposal. House Research Organization Bill Analysis, Mar. 5, 2007, p. 10 (stating that "the law would impose an excessive punishment and fail to pass the proportionality test established by the U. S. Supreme Court" and arguing that "Texas should not enact a law of questionable constitutionality simply because it is politically popular, especially given clues by the U. S. Su-

preme Court that death penalty laws that would be rarely imposed or that are not supported by a broad national consensus would be ruled unconstitutional").

C

Because of the effect of the *Coker* dicta, the Court is plainly wrong in comparing the situation here to that in *Atkins* or *Roper* v. *Simmons*, 543 U. S. 551 (2005). See *ante*, at 425. *Atkins* concerned the constitutionality of imposing the death penalty on a mentally retarded defendant. Thirteen years earlier, in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), the Court had held that this was permitted by the Eighth Amendment, and therefore, during the time between *Penry* and *Atkins*, state legislators had reason to believe that this Court would follow its prior precedent and uphold statutes allowing such punishment.

The situation in *Roper* was similar. *Roper* concerned a challenge to the constitutionality of imposing the death penalty on a defendant who had not reached the age of 18 at the time of the crime. Sixteen years earlier, in *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), the Court had rejected a similar challenge, and therefore state lawmakers had cause to believe that laws allowing such punishment would be sustained.

When state lawmakers believe that their decision will prevail on the question whether to permit the death penalty for a particular crime or class of offender, the legislators' resolution of the issue can be interpreted as an expression of their own judgment, informed by whatever weight they attach to the values of their constituents. But when state legislators think that the enactment of a new death penalty law is likely to be futile, inaction cannot reasonably be interpreted as an expression of their understanding of prevailing societal values. In that atmosphere, legislative inaction is more likely to evidence acquiescence.

D

If anything can be inferred from state legislative developments, the message is very different from the one that the Court perceives. In just the past few years, despite the shadow cast by the *Coker* dicta, five States have enacted targeted capital child-rape laws. See Ga. Code Ann. § 16–6–1 (1999); Mont. Code Ann. § 45–5–503 (1997); Okla. Stat., Tit. 10, § 7115(K) (West Supp. 2008); S. C. Code Ann. § 16–3–655(C)(1) (Supp. 2007); Tex. Penal Code Ann. §§ 22.021(a), 12.42(c)(3) (West Supp. 2007). If, as the Court seems to think, our society is "evolving" toward ever higher "standards of decency," *ante*, at 446, these enactments might represent the beginning of a new evolutionary line.

Such a development would not be out of step with changes in our society's thinking since *Coker* was decided. During that time, reported instances of child abuse have increased dramatically;[2] and there are many indications of growing alarm about the sexual abuse of children. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U. S. C. § 14071 (2000 ed. and Supp. V), which requires States receiving certain federal funds to establish registration systems

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[2] From 1976 to 1986, the number of reported cases of child sexual abuse grew from 6,000 to 132,000, an increase of 2,100%. A. Lurigio, M. Jones, & B. Smith, Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice, 59 Fed. Probation 69 (Sept. 1995). By 1991, the number of cases totaled 432,000, an increase of another 227%. *Ibid.* In 1995, local child protection services agencies identified 126,000 children who were victims of either substantiated or indicated sexual abuse. Nearly 30% of those child victims were between the ages of four and seven. Rape, Abuse & Incest National Network Statistics, online at http://www.rainn.org/get-information/statistics/sexual-assault-victims. There were an estimated 90,000 substantiated cases of child sexual abuse in 2003. Crimes Against Children Research Center, Reports From the States to the National Child Abuse and Neglect Data System, available at http://www.unh.edu/ccrc/sexual-abuse/Child%20Sexual%20Abuse.pdf.

for convicted sex offenders and to notify the public about persons convicted of the sexual abuse of minors. All 50 States have now enacted such statutes.[3] In addition, at

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[3] Ala. Code §§13A–11–200 to 13A–11–202, 13A–11–1181 (2006); Alaska Stat. §§11.56.840, 12.63.010 to 12.63.100, 18.65.087, 28.05.048, 33.30.035 (2006); Ariz. Rev. Stat. Ann. §§13–3821 to 13–3825 (2001 and Supp. 2007); Ark. Code Ann. §§12–12–901 to 12–12–909 (2003 and Supp. 2007); Cal. Penal Code Ann. §§290 to 290.4 (2008); Colo. Rev. Stat. Ann. §§16–22–103 to 16–22–104, 18–3–412.5 (2007); Conn. Gen. Stat. §§54–251 to 54–254 (2008 Supp.); Del. Code Ann., Tit. 11, §4120 (2007); Fla. Stat. Ann. §§775.13, 775.21 (2007); Ga. Code Ann. §42–1–12 (Supp. 2007); Haw. Rev. Stat. §§846E–1, 846E–2 (2006 Cum. Supp.); Idaho Code §§18–8304 to 18–8311 (Supp. 2008); Ill. Comp. Stat. Ann., ch. 730, §§150/1 to 150/10, 152/101 to 152/121 (2006); Ind. Code §§11–8–8–1 to 11–8–8–7 (Supp. 2007); Iowa Code Ann. §§692A.1 to 692A.16 (2003 and Supp. 2008); Kan. Stat. Ann. §§22–4901 to 22–4910 (1995); Ky. Rev. Stat. Ann. §§17.500 to 17.540 (Lexis 2003 and Supp. 2007); La. Stat. Ann. §§15:540 to 15:549 (2005 and Supp. 2008); Me. Rev. Stat. Ann., Tit. 34–A, §§11201 to 11204, 11221 to 11228 (2007 Supp. Pamphlet); Md. Crim. Proc. Code Ann. §§11–701 to 11–721 (Lexis 2001 and Supp. 2007); Mass. Gen. Laws Ann., ch. 6, §§178D to 178J (West 2006 and Supp. 2008); Mich. Comp. Laws §§28.721 to 28.731 (West 2004 and Supp. 2008); Minn. Stat. Ann. §243.166 (West 2003 and Supp. 2008); Miss. Code Ann. §§45–33–21 to 45–33–59 (West 1999 and Supp. 2007); Mo. Rev. Stat. Ann. §§589.400 to 589.425 (2003 and Supp. 2008), §211.45 (2004); Mont. Code Ann. §§46–23–501 to 46–23–507 (2007); Neb. Rev. Stat. §§29–4001 to 29–4013 (2003 and Supp. 2007); Nev. Rev. Stat. §§179B.010 to 179B.250 (2007); N. H. Rev. Stat. Ann. §§651–B:1 to 651–B:7 (2007 and Supp. 2007); N. J. Stat. Ann. §§2C:7–1 to 2C:7–20 (West 2005 and Supp. 2008); N. M. Stat. Ann. §§29–11A–1 to 29–11A–8 (2004 and Supp. 2008); N. Y. Correc. Law Ann., Art. 6–C, §§168 to 168–V (West 2003 and Supp. 2008); N. C. Gen. Stat. Ann. §§14–208.5 to 14–208.26 (Lexis 2007); N. D. Cent. Code Ann. §12.1–32–15 (Lexis 1997 and Supp. 2007); Ohio Rev. Code Ann. §§2950.01 to 2950.11 (West 2006 and Supp. 2008); Okla. Stat., Tit. 57, §§581 to 585 (West 2001), Tit. 57, §§591 to 594 (West 2007 Supp.); Ore. Rev. Stat. §§181.585 to 181.606, 181.826 (2007); 42 Pa. Cons. Stat. §§9791 to 9799.9 (2006); R. I. Gen. Laws §§11–37.1–1 to 11–37.1–12 (2002 and Supp. 2007); S. C. Code Ann. §§23–3–430 to 23–3–490 (2007 and Supp. 2007); S. D. Codified Laws §§22–24B–1 to 22–24B–15 (2006 and Supp. 2008); Tenn. Code Ann. §§40–39–201 to 40–39–212 (2006 and Supp. 2007); Tex. Code Crim. Proc. Ann., Arts. 62.001 to 62.002, 62.051 to 62.059 (Vernon 2006 and Supp. 2008); Utah Code Ann. §77–27–

least 21 States and the District of Columbia now have statutes permitting the involuntary commitment of sexual predators,[4] and at least 12 States have enacted residency restrictions for sex offenders.[5]

21.5 (2003 and 2008 Supp.); Vt. Stat. Ann., Tit. 13, §§5401 to 5414 (1998 and Supp. 2007); Va. Code Ann. §§9.1–900 to 9.1–921 (2006 and Supp. 2007); Wash. Rev. Code §§4.24.550, 9A.44.130, 9A.44.140, 10.01.200, 70.48.470, 72.09.330 (2006); W. Va. Code Ann. §§15–12–1 to 15–12–10 (Lexis 2004 and Supp. 2007); Wis. Stat. §§301.45 to 301.48 (2005 and Supp. 2007); Wyo. Stat. Ann. §§7–19–301 to 7–19–307 (2005).

[4]Those States are Arizona, California, Connecticut, the District of Columbia, Florida, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, North Dakota, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin. See Ariz. Rev. Stat. Ann. §§36–3701 to 36–3717 (West 2003 and Supp. 2007); Cal. Welf. & Inst. Code Ann. §§6600 to 6609.3 (West 1998 and Supp. 2008); Conn. Gen. Stat. §17a–566 (2006); D. C. Code §§22–3803 to 22–3811 (2001); Fla. Stat. Ann. §§394.910 to 394.932 (West 2006 and Supp. 2008); Ill. Comp. Stat., ch. 725, §§207/1 to 207/99 (2006); Iowa Code Ann. §§229A.1 to 229A.16 (West 2006 and Supp. 2008); Kan. Stat. Ann. §§59–29a01 to 59–29a21 (2005 and 2007 Cum. Supp.); Ky. Rev. Stat. Ann. §202A.051 (West 2006); Mass. Ann. Laws, ch. 123A *et seq.* (2003 and Supp. 2008); Minn. Stat. Ann. §§253B.01 to 253B.23 (2003 and Supp. 2007); Mo. Ann. Stat. §§632.480 to 632.513 (West 2006 and Supp. 2008); Neb. Rev. Stat. Ann. §§83–174 to 83–174.05 (Lexis 2007); N. J. Stat. Ann. §§30:4–27.24 to 30:4–27.38 (West 2008); N. D. Cent. Code Ann. §§25–03.3–01 to 25–03.3–23 (Lexis 2002 and Supp. 2007); Ore. Rev. Stat. §§426.005 to 426.070, 426.510 to 426.680 (2007); Pa. Stat. Ann., Tit. 42, §§9791 to 9799.9 (Purdon 2007 and Supp. 2008); S. C. Code Ann. §§44–48–10 to 44–48–170 (2002 and Supp. 2007); Tex. Health & Safety Code Ann. §§841.001 to 841.150 (West 2003 and Supp. 2007); Va. Code Ann. §§37.2–900 to 37.2–920 (Lexis 2005 and Supp. 2007); Wash. Rev. Code Ann. §§71.09.010 to 71.09.902 (West 2002 and Supp. 2008); Wis. Stat. Ann. §§980.01 to 980.14 (West 2007).

[5]See Ala. Code §15–20–26 (Supp. 2007) (restricts sex offenders from residing or accepting employment within 2,000 feet of school or childcare facility); Ark. Code Ann. §5–14–128 (Supp. 2007) (unlawful for level three or four sex offenders to reside within one-half mile of school or daycare center); Cal. Penal Code Ann. §3003 (West Supp. 2008) (parolees may not live within 35 miles of victim or witnesses, and certain sex offenders on parole may not live within one-half mile from a primary school); Fla. Stat. Ann. §947.1405(7)(a)(2) (West Supp. 2008) (released sex offender with vic-

Seeking to counter the significance of the new capital child-rape laws enacted during the past two years, the Court points out that in recent months efforts to enact similar laws in five other States have stalled. *Ante*, at 431–432. These developments, however, all took place after our decision to grant certiorari in this case, see 552 U. S. 1087 (2008), which gave state legislators reason to delay the enactment of new legislation until the constitutionality of such laws was clarified. And there is no evidence of which I am aware that these legislative initiatives failed because the proposed laws were viewed as inconsistent with our society's standards of decency.

On the contrary, the available evidence suggests otherwise. For example, in Colorado, the Senate Appropriations Committee in April voted 6 to 4 against Senate Bill 195, reportedly because it "would have cost about $616,000 next year for trials, appeals, public defenders, and prison costs." Associated Press, Lawmakers Reject Death Penalty for

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tim under 18 prohibited from living within 1,000 feet of a school, daycare center, park, playground, or other place where children regularly congregate); Ga. Code Ann. §§42–1–13, 42–1–15 (Supp. 2007) (sex offenders required to register shall not reside within 1,000 feet of any childcare facility, school, or area where minors congregate); Ill. Comp. Stat., ch. 720, §5/11–9.3(b–5) (West 2006) (child sex offenders prohibited from knowingly residing within 500 feet of schools); Ky. Rev. Stat. Ann. §17.545 (West Supp. 2007) (registered sex offenders on supervised release shall not reside within 1,000 feet of school or childcare facility); La. Stat. Ann. §14:91.1 (West Supp. 2008) (sexually violent predators shall not reside within 1,000 feet of schools unless permission is given by school superintendent); Ohio Rev. Code Ann. §2950.034 (Lexis Supp. 2008) (sex offenders prohibited from residing within 1,000 feet of school); Okla. Stat., Tit. 57, §590 (West Supp. 2008) (prohibits sex offenders from residing within 2,000 feet of schools or educational institutions); Ore. Rev. Stat. §144.642 (2007) (incorporates general prohibition on supervised sex offenders living near places where children reside); Tenn. Code Ann. §40–39–111 (2006) (repealed by Acts 2004, ch. 921, §4, effective Aug. 1, 2004) (sex offenders prohibited from establishing residence within 1,000 feet of school, childcare facility, or victim).

Child Sex Abusers, Denver Post, Apr. 11, 2008. Likewise, in Tennessee, the capital child-rape bill was withdrawn in committee "because of the high associated costs." The bill's sponsor stated that "'[b]ecause of the state's budget situation, we thought to withdraw that bill. . . . We'll revisit it next year to see if we can reduce the cost of the fiscal note.'" Green, Small Victory in Big Fight for Tougher Sex Abuse Laws, The Leaf-Chronicle, May 8, 2008, p. 1A. Thus, the failure to enact capital child-rape laws cannot be viewed as evidence of a moral consensus against such punishment.

E

Aside from its misleading tally of current state laws, the Court points to two additional "objective indicia" of a national "consensus," *ante*, at 422, but these arguments are patent makeweights. The Court notes that Congress has not enacted a law permitting a federal district court to impose the death penalty for the rape of a child, *ante*, at 423, but due to the territorial limits of the relevant federal statutes, very few rape cases, not to mention child-rape cases, are prosecuted in federal court. See 18 U. S. C. §§2241, 2242 (2000 ed. and Supp. V); United States Sentencing Commission, Report to Congress: Analysis of Penalties for Federal Rape Cases, p. 10, Table 1. Congress' failure to enact a death penalty statute for this tiny set of cases is hardly evidence of Congress' assessment of our society's values.[6]

Finally, the Court argues that statistics about the number of executions in rape cases support its perception of a "national consensus," but here too the statistics do not support the Court's position. The Court notes that the last execution for the rape of a child occurred in 1964, *ante*, at 433, but the Court fails to mention that litigation regarding the

[6] Moreover, as noted in the petition for rehearing, the Uniform Code of Military Justice permits such a sentence. See 10 U. S. C. §856 (2000 ed.); Manual for Courts-Martial, United States, Part II, Ch. X, Rule 1004(c)(9), p. II–131 (2008); *id.*, Part IV, Art. 120, ¶45.f(1), p. IV–78.

constitutionality of the death penalty brought executions to a halt across the board in the late 1960's. In 1965 and 1966, there were a total of eight executions for all offenses, and from 1968 until 1977, the year when *Coker* was decided, there were no executions for any crimes.[7] The Court also fails to mention that in Louisiana, since the state law was amended in 1995 to make child rape a capital offense, prosecutors have asked juries to return death verdicts in four cases. See *State* v. *Dickerson*, 01–1287 (La. App. 6/26/02), 822 So. 2d 849; *State* v. *LeBlanc*, 00–1322 (La. App. 5/13/01), 788 So. 2d 1255; 957 So. 2d 757; *State* v. *Davis*, Case No. 262,971 (1st Jud. Dist., Caddo Parish, La.) (cited in Brief for Respondent 42, and n. 38). In two of those cases, Louisiana juries imposed the death penalty. See 957 So. 2d 757; *Davis*, *supra*. This 50% record is hardly evidence that juries share the Court's view that the death penalty for the rape of a young child is unacceptable under even the most aggravated circumstances.[8]

F

In light of the points discussed above, I believe that the "objective indicia" of our society's "evolving standards of decency" can be fairly summarized as follows. Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the "national consensus" that the Court perceives. State legislatures, for more than 30 years, have operated under the ominous shadow of the *Coker* dicta and thus have not been free to express their own understanding of our society's standards of decency. And in the months following our grant of certiorari in this case, state

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[7] Department of Justice, Bureau of Justice Statistics, online at http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm; see also Death Penalty Information Center, Executions in the U. S. 1608–2002: The ESPY File Executions by Date (2007), online at http://www.deathpenaltyinfo.org/ESPYyear.pdf.

[8] Of course, the other five capital child-rape statutes are too recent for any individual to have been sentenced to death under them.

legislatures have had an additional reason to pause. Yet despite the inhibiting legal atmosphere that has prevailed since 1977, six States have recently enacted new, targeted child-rape laws.

I do not suggest that six new state laws necessarily establish a "national consensus" or even that they are sure evidence of an ineluctable trend. In terms of the Court's metaphor of moral evolution, these enactments might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage.

II

A

The Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court's "own judgment" regarding "the acceptability of the death penalty." *Ante*, at 434 (internal quotation marks omitted). Although the Court has much to say on this issue, most of the Court's discussion is not pertinent to the Eighth Amendment question at hand. And once all of the Court's irrelevant arguments are put aside, it is apparent that the Court has provided no coherent explanation for today's decision.

In the next section of this opinion, I will attempt to weed out the arguments that are not germane to the Eighth Amendment inquiry, and in the final section, I will address what remains.

B

A major theme of the Court's opinion is that permitting the death penalty in child-rape cases is not in the best interests of the victims of these crimes and society at large. In this vein, the Court suggests that it is more painful for child-rape victims to testify when the prosecution is seeking

the death penalty. *Ante*, at 442–443. The Court also argues that "a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim," *ante*, at 445, and may discourage the reporting of child rape, *ante*, at 444–445.

These policy arguments, whatever their merits, are simply not pertinent to the question whether the death penalty is "cruel and unusual" punishment. The Eighth Amendment protects the right of an accused. It does not authorize this Court to strike down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society. The Court's policy arguments concern matters that legislators should—and presumably do—take into account in deciding whether to enact a capital child-rape statute, but these arguments are irrelevant to the question that is before us in this case. Our cases have cautioned against using "'the aegis of the Cruel and Unusual Punishment Clause' to cut off the normal democratic processes," *Atkins* v. *Virginia*, 536 U. S., at 323 (Rehnquist, C. J., dissenting) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 176 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)), but the Court forgets that warning here.

The Court also contends that laws permitting the death penalty for the rape of a child create serious procedural problems. Specifically, the Court maintains that it is not feasible to channel the exercise of sentencing discretion in child-rape cases, *ante*, at 439–440, and that the unreliability of the testimony of child victims creates a danger that innocent defendants will be convicted and executed, *ante*, at 443–444. Neither of these contentions provides a basis for striking down all capital child-rape laws no matter how carefully and narrowly they are crafted.

The Court's argument regarding the structuring of sentencing discretion is hard to comprehend. The Court finds it "difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe

cases of child rape and yet not imposed in an arbitrary way." *Ante*, at 439. Even assuming that the age of a child is not alone a sufficient factor for limiting sentencing discretion, the Court need only examine the child-rape laws recently enacted in Texas, Oklahoma, Montana, and South Carolina, all of which use a concrete factor to limit quite drastically the number of cases in which the death penalty may be imposed. In those States, a defendant convicted of the rape of a child may be sentenced to death only if the defendant has a prior conviction for a specified felony sex offense. See Mont. Code Ann. § 45–5–503(3)(c) (2007) ("If the offender was previously convicted of [a felony sexual offense] . . . the offender shall be . . . punished by death . . . "); Okla. Stat., Tit. 10, § 7115(K) (West Supp. 2008) ("Notwithstanding any other provision of law, any parent or other person convicted of forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age subsequent to a previous conviction for any offense of forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age shall be punished by death"); S. C. Code Ann. § 16–3–655(C)(1) (Supp. 2007) ("If the [defendant] has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for first degree criminal sexual conduct with a minor who is less than eleven years of age . . . he must be punished by death or by imprisonment for life"); Tex. Penal Code Ann. § 12.42(c)(3) (West Supp. 2007) ("[A] defendant shall be punished for a capital felony if it is shown on the trial of an offense under Section 22.021 . . . that the defendant has previously been finally convicted of [a felony sexual offense against a victim younger than fourteen years of age]").

Moreover, it takes little imagination to envision other limiting factors that a State could use to structure sentencing discretion in child-rape cases. Some of these might be: whether the victim was kidnaped, whether the defendant inflicted severe physical injury on the victim, whether the vic-

tim was raped multiple times, whether the rapes occurred over a specified extended period, and whether there were multiple victims.

The Court refers to limiting standards that are "indefinite and obscure," *ante*, at 441, but there is nothing indefinite or obscure about any of the above-listed aggravating factors. Indeed, they are far more definite and clear cut than aggravating factors that we have found to be adequate in murder cases. See, *e. g.*, *Arave* v. *Creech*, 507 U. S. 463, 471 (1993) (whether the defendant was a "'cold-blooded, pitiless slayer'"); *Walton* v. *Arizona*, 497 U. S. 639, 646 (1990) (whether the "'perpetrator inflict[ed] mental anguish or physical abuse before the victim's death'"); *Jurek* v. *Texas*, 428 U. S. 262, 269 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (whether the defendant "'would commit criminal acts of violence that would constitute a continuing threat to society'"). For these reasons, concerns about limiting sentencing discretion provide no support for the Court's blanket condemnation of all capital child-rape statutes.

That sweeping holding is also not justified by the Court's concerns about the reliability of the testimony of child victims. First, the Eighth Amendment provides a poor vehicle for addressing problems regarding the admissibility or reliability of evidence, and problems presented by the testimony of child victims are not unique to capital cases. Second, concerns about the reliability of the testimony of child witnesses are not present in every child-rape case. In the case before us, for example, there was undisputed medical evidence that the victim was brutally raped, as well as strong independent evidence that petitioner was the perpetrator. Third, if the Court's evidentiary concerns have Eighth Amendment relevance, they could be addressed by allowing the death penalty in only those child-rape cases in which the independent evidence is sufficient to prove all the elements needed for conviction and imposition of a death sentence. There is precedent for requiring special corroboration in certain criminal

cases. For example, some jurisdictions do not allow a conviction based on the uncorroborated testimony of an accomplice. See, *e. g.*, Ala. Code § 12–21–222 (1986); Alaska Stat. § 12.45.020 (1984); Ark. Code Ann. § 16–89–111(e)(1) (1977); Cal. Penal Code Ann. § 1111 (West 1985); Ga. Code Ann. § 24–4–8 (1995); Idaho Code § 19–2117 (Lexis 1979); Minn. Stat. § 634.04 (1983); Mont. Code Ann. § 46–16–213 (1985); Nev. Rev. Stat. § 175.291 (1985); N. D. Cent. Code Ann. § 29–21–14 (Lexis 1974); Okla. Stat., Tit. 22, § 742 (West 1969); Ore. Rev. Stat. § 136.440 (1984); S. D. Codified Laws § 23A–22–8 (1979). A State wishing to permit the death penalty in child-rape cases could impose an analogous corroboration requirement.

C

After all the arguments noted above are put aside, what is left? What remaining grounds does the Court provide to justify its independent judgment that the death penalty for child rape is categorically unacceptable? I see two.

1

The first is the proposition that we should be "most hesitant before interpreting the Eighth Amendment to allow the *extension* of the death penalty." *Ante*, at 435 (emphasis added); see also *ante*, at 437, 441 (referring to expansion of the death penalty). But holding that the Eighth Amendment does not categorically prohibit the death penalty for the rape of a young child would not "extend" or "expand" the death penalty. Laws enacted by the state legislatures are presumptively constitutional, *Gregg*, 428 U. S., at 175 (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity"), and until today, this Court has not held that capital child-rape laws are unconstitutional, see *ante*, at 428 (*Coker* "does not speak to the constitutionality of the death penalty for child rape, an issue not then before the Court").

Consequently, upholding the constitutionality of such a law would not "extend" or "expand" the death penalty; rather, it would confirm the status of presumptive constitutionality that such laws have enjoyed up to this point. And in any event, this Court has previously made it clear that "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." *Harmelin* v. *Michigan*, 501 U. S. 957, 990 (1991) (principal opinion); see also *Gregg*, *supra*, at 176 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

2

The Court's final—and, it appears, principal—justification for its holding is that murder, the only crime for which defendants have been executed since this Court's 1976 death penalty decisions,[9] is unique in its moral depravity and in the severity of the injury that it inflicts on the victim and the public. See *ante*, at 437–438. But the Court makes little attempt to defend these conclusions.

With respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly, but was not the triggerman and did not intend the killing. See, *e. g.*, *Tison* v. *Arizona*, 481 U. S. 137 (1987). In the second case, a previously convicted child rapist kidnaps, repeatedly rapes, and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second?

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[9] *Gregg* v. *Georgia*, 428 U. S. 153; *Proffitt* v. *Florida*, 428 U. S. 242; *Jurek* v. *Texas*, 428 U. S. 262; *Woodson* v. *North Carolina*, 428 U. S. 280; *Roberts* v. *Louisiana*, 428 U. S. 325.

The Court's decision here stands in stark contrast to *Atkins* and *Roper*, in which the Court concluded that characteristics of the affected defendants—mental retardation in *Atkins* and youth in *Roper*—diminished their culpability. See *Atkins*, 536 U. S., at 305; *Roper*, 543 U. S., at 571. Nor is this case comparable to *Enmund* v. *Florida*, 458 U. S. 782 (1982), in which the Court held that the Eighth Amendment prohibits the death penalty where the defendant participated in a robbery during which a murder was committed but did not personally intend for lethal force to be used. I have no doubt that, under the prevailing standards of our society, robbery, the crime that the petitioner in *Enmund* intended to commit, does not evidence the same degree of moral depravity as the brutal rape of a young child. Indeed, I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.

With respect to the question of the harm caused by the rape of a child in relation to the harm caused by murder, it is certainly true that the loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence. And the Court does not take the position that no harm other than the loss of life is sufficient. The Court takes pains to limit its holding to "crimes against individual persons" and to exclude "offenses against the State," a category that the Court stretches—without explanation—to include "drug kingpin activity." *Ante*, at 437. But the Court makes no effort to explain why the harm caused by such crimes is necessarily greater than the harm caused by the rape of young children. This is puzzling in light of the Court's acknowledgment that "[r]ape has a permanent psychological, emotional, and sometimes physical impact on the child." *Ante*, at 435. As the Court aptly recognizes, "[w]e cannot dismiss the years of

long anguish that must be endured by the victim of child rape." *Ibid.*

The rape of any victim inflicts great injury, and "[s]ome victims are so grievously injured physically or psychologically that life *is* beyond repair." *Coker*, 433 U. S., at 603 (opinion of Powell, J.). "The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped." Meister, Murdering Innocence: The Constitutionality of Capital Child Rape Statutes, 45 Ariz. L. Rev. 197, 208–209 (2003). See also *State* v. *Wilson*, 96–1392, p. 6 (La. 12/13/96), 685 So. 2d 1063, 1067; Broughton, "On Horror's Head Horrors Accumulate": A Reflective Comment on Capital Child Rape Legislation, 39 Duquesne L. Rev. 1, 38 (2000). Long-term studies show that sexual abuse is "grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate." C. Bagley & K. King, Child Sexual Abuse: The Search for Healing 2 (1990).

It has been estimated that as many as 40% of 7- to 13-year-old sexual assault victims are considered "seriously disturbed." A. Lurigio, M. Jones, & B. Smith, Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice, 59 Fed. Probation 69, 70 (Sept. 1995). Psychological problems include sudden school failure, unprovoked crying, dissociation, depression, insomnia, sleep disturbances, nightmares, feelings of guilt and inferiority, and self-destructive behavior, including an increased incidence of suicide. Meister, *supra*, at 209; Broughton, *supra*, at 38; Glazer, Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute, 25 Am. J. Crim. L. 79, 88 (1997).

The deep problems that afflict child-rape victims often become society's problems as well. Commentators have noted

correlations between childhood sexual abuse and later problems such as substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness. Broughton, *supra*, at 38; Glazer, *supra*, at 89; Handbook on Sexual Abuse of Children 7 (L. Walker ed. 1988). Victims of child rape are nearly 5 times more likely than nonvictims to be arrested for sex crimes and nearly 30 times more likely to be arrested for prostitution. *Ibid.*

The harm that is caused to the victims and to society at large by the worst child rapists is grave. It is the judgment of the Louisiana lawmakers and those in an increasing number of other States that these harms justify the death penalty. The Court provides no cogent explanation why this legislative judgment should be overridden. Conclusory references to "decency," "moderation," "restraint," "full progress," and "moral judgment" are not enough.

III

In summary, the Court holds that the Eighth Amendment categorically rules out the death penalty in even the most extreme cases of child rape even though: (1) This holding is not supported by the original meaning of the Eighth Amendment; (2) neither *Coker* nor any other prior precedent commands this result; (3) there are no reliable "objective indicia" of a "national consensus" in support of the Court's position; (4) sustaining the constitutionality of the state law before us would not "extend" or "expand" the death penalty; (5) this Court has previously rejected the proposition that the Eighth Amendment is a one-way ratchet that prohibits legislatures from adopting new capital punishment statutes to meet new problems; (6) the worst child rapists exhibit the epitome of moral depravity; and (7) child rape inflicts grievous injury on victims and on society in general.

The party attacking the constitutionality of a state statute bears the "heavy burden" of establishing that the law is unconstitutional. *Gregg*, 428 U. S., at 175 (joint opinion of Stewart, Powell, and STEVENS, JJ.). That burden has not been discharged here, and I would therefore affirm the decision of the Louisiana Supreme Court.

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EXXON SHIPPING CO. ET AL. *v.* BAKER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–219. Argued February 27, 2008—Decided June 25, 2008

In 1989, petitioners' (collectively, Exxon) supertanker grounded on a reef off Alaska, spilling millions of gallons of crude oil into Prince William Sound. The accident occurred after the tanker's captain, Joseph Hazelwood—who had a history of alcohol abuse and whose blood still had a high alcohol level 11 hours after the spill—inexplicably exited the bridge, leaving a tricky course correction to unlicensed subordinates. Exxon spent some $2.1 billion in cleanup efforts, pleaded guilty to criminal violations occasioning fines, settled a civil action by the United States and Alaska for at least $900 million, and paid another $303 million in voluntary payments to private parties. Other civil cases were consolidated into this one, brought against Exxon, Hazelwood, and others to recover economic losses suffered by respondents (hereinafter Baker), who depend on Prince William Sound for their livelihoods. At Phase I of the trial, the jury found Exxon and Hazelwood reckless (and thus potentially liable for punitive damages) under instructions providing that a corporation is responsible for the reckless acts of employees acting in a managerial capacity in the scope of their employment. In Phase II, the jury awarded $287 million in compensatory damages to some of the plaintiffs; others had settled their compensatory claims for $22.6 million. In Phase III, the jury awarded $5,000 in punitive damages against Hazelwood and $5 billion against Exxon. The Ninth Circuit upheld the Phase I jury instruction on corporate liability and ultimately remitted the punitive-damages award against Exxon to $2.5 billion.

Held:

1. Because the Court is equally divided on whether maritime law allows corporate liability for punitive damages based on the acts of managerial agents, it leaves the Ninth Circuit's opinion undisturbed in this respect. Of course, this disposition is not precedential on the derivative liability question. See, *e. g.*, *Neil* v. *Biggers*, 409 U. S. 188, 192. Pp. 482–484.

2. The Clean Water Act's (CWA) water pollution penalties, 33 U. S. C. § 1321, do not preempt punitive-damages awards in maritime spill cases. Section 1321(b) protects "navigable waters . . . , adjoining shorelines, . . . [and] natural resources," subject to a saving clause reserving "obli-

gations . . . under any . . . law for damages to any . . . privately owned property resulting from [an oil] discharge," § 1321(*o*). Exxon's admission that the CWA does not displace compensatory remedies for the consequences of water pollution, even those for economic harms, leaves the company with the untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. Nothing in the statute points to that result, and the Court has rejected similar attempts to sever remedies from their causes of action, see *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 255–256. There is no clear indication of congressional intent to occupy the entire field of pollution remedies, nor is it likely that punitive damages for private harms will have any frustrating effect on the CWA's remedial scheme. Pp. 484–489.

3. The punitive-damages award against Exxon was excessive as a matter of maritime common law. In the circumstances of this case, the award should be limited to an amount equal to compensatory damages. Pp. 489–515.

(a) Although legal codes from ancient times through the Middle Ages called for multiple damages for certain especially harmful acts, modern Anglo-American punitive damages have their roots in 18th-century English law and became widely accepted in American courts by the mid-19th century. See, *e. g.*, *Day* v. *Woodworth*, 13 How. 363, 371. Pp. 490–491.

(b) The prevailing American rule limits punitive damages to cases of "enormity," *Day*, *supra*, at 371, in which a defendant's conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference for others' rights, or even more deplorable behavior. The consensus today is that punitive damages are aimed at retribution and deterring harmful conduct. Pp. 491–495.

(c) State regulation of punitive damages varies. A few States award them rarely, or not at all, and others permit them only when authorized by statute. Many States have imposed statutory limits on punitive awards, in the form of absolute monetary caps, a maximum ratio of punitive to compensatory damages, or, frequently, some combination of the two. Pp. 495–497.

(d) American punitive damages have come under criticism in recent decades, but the most recent studies tend to undercut much of it. Although some studies show the dollar amounts of awards growing over time, even in real terms, most accounts show that the median ratio of punitive to compensatory awards remains less than 1:1. Nor do the data show a marked increase in the percentage of cases with punitive awards. The real problem is the stark unpredictability of punitive awards. Courts are concerned with fairness as consistency, and the available data suggest that the spread between high and low individual awards is unacceptable. The spread in state civil trials is great, and

the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories. The distribution of judge-assessed awards is narrower, but still remarkable. These ranges might be acceptable if they resulted from efforts to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, but anecdotal evidence suggests that is not the case, see, *e. g.*, *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 565, n. 8. Pp. 497–501.

(e) This Court's response to outlier punitive-damages awards has thus far been confined by claims that state-court awards violated due process. See, *e. g.*, *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 425. In contrast, today's enquiry arises under federal maritime jurisdiction and requires review of a jury award at the level of judge-made federal common law that precedes and should obviate any application of the constitutional standard. In this context, the unpredictability of high punitive awards is in tension with their punitive function because of the implication of unfairness that an eccentrically high punitive verdict carries. A penalty should be reasonably predictable in its severity, so that even Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. And a penalty scheme ought to threaten defendants with a fair probability of suffering in like degree for like damage. Cf. *Koon* v. *United States*, 518 U. S. 81, 113. Pp. 501–503.

(f) The Court considers three approaches, one verbal and two quantitative, to arrive at a standard for assessing maritime punitive damages. Pp. 503–515.

(i) The Court is skeptical that verbal formulations are the best insurance against unpredictable outlier punitive awards, in light of its experience with attempts to produce consistency in the analogous business of criminal sentencing. Pp. 503–506.

(ii) Thus, the Court looks to quantified limits. The option of setting a hard dollar punitive cap, however, is rejected because there is no "standard" tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board; and because a judicially selected dollar cap would carry the serious drawback that the issue might not return to the docket before there was a need to revisit the figure selected. Pp. 506–512.

(iii) The more promising alternative is to peg punitive awards to compensatory damages using a ratio or maximum multiple. This is the model in many States and in analogous federal statutes allowing multiple damages. The question is what ratio is most appropriate. An acceptable standard can be found in the studies showing the median ratio of punitive to compensatory awards. Those studies reflect the judgments of juries and judges in thousands of cases as to what punitive

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awards were appropriate in circumstances reflecting the most down to the least blameworthy conduct, from malice and avarice to recklessness to gross negligence. The data in question put the median ratio for the entire gamut at less than 1:1, meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, awards at or below the median would roughly express jurors' sense of reasonable penalties in cases like this one that have no earmarks of exceptional blameworthiness. Accordingly, the Court finds that a 1:1 ratio is a fair upper limit in such maritime cases. Pp. 512–515.

(iv) Applying this standard to the present case, the Court takes for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount. P. 515.

472 F. 3d 600 and 490 F. 3d 1066, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined, and in which STEVENS, GINSBURG, and BREYER, JJ., joined, as to Parts I, II, and III. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 515. STEVENS, J., *post*, p. 516, GINSBURG, J., *post*, p. 523, and BREYER, J., *post*, p. 525, filed opinions concurring in part and dissenting in part. ALITO, J., took no part in the consideration or decision of the case.

Walter Dellinger argued the cause for petitioners. With him on the briefs were *John F. Daum*, *Jonathan D. Hacker*, and *E. Edward Bruce*.

Jeffrey L. Fisher argued the cause for respondents. With him on the brief were *David W. Oesting*, *Stephen M. Rummage*, *David C. Tarshes*, *James vanR. Springer*, and *Brian B. O'Neill*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Carter G. Phillips*, *Virginia A. Seitz*, *Robin S. Conrad*, and *Amar D. Sarwal*; for the International Chamber of Shipping et al. by *Chester Douglas Hooper*, *Jovi Tener*, *Dennis L. Bryant*, *Richard J. Reisert*, *Joseph G. Grasso*, and *Raymond L. Massey*; for the Product Liability Advisory Council, Inc., by *Malcolm E. Wheeler* and *Craig R. May*; for the Transportation Institute et al. by *Mark I. Levy*, *James L. Henry*, and *C. Jonathan Benner*; and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alaska by *Talis J. Colberg*, Attorney General of Alaska, *Craig J. Tillery*,

JUSTICE SOUTER delivered the opinion of the Court.

There are three questions of maritime law before us: whether a shipowner may be liable for punitive damages

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Deputy Attorney General, *Joanne Grace*, Chief Assistant Attorney General, *David C. Frederick*, and *Scott H. Angstreich*; for the State of Maryland et al. by *Douglas F. Gansler*, Attorney General of Maryland, *John B. Howard, Jr.*, Deputy Attorney General, and *Steven M. Sullivan*, Solicitor General, and by the Attorneys General for their respective States as follows: *Dustin McDaniel* of Arkansas, *Edmund G. Brown, Jr.*, of California, *Richard Blumenthal* of Connecticut, *Joseph R. Biden III* of Delaware, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Jack Conway* of Kentucky, *James D. Caldwell* of Louisiana, *G. Steven Rowe* of Maine, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Kelly Ayotte* of New Hampshire, *Anne Milgram* of New Jersey, *Gary King* of New Mexico, *Andrew Cuomo* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Marc Dann* of Ohio, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Larry Long* of South Dakota, *Robert E. Cooper* of Tennessee, *Mark Shurtleff* of Utah, *Rob McKenna* of Washington, and *Darrell V. McGraw, Jr.*, of West Virginia; for the Alaska Legislative Council et al. by *Jared A. Goldstein*; for the American Association for Justice et al. by *Jeffrey Robert White*, *Robert S. Peck*, *Arthur H. Bryant*, *Kathleen Flynn Peterson*, and *Leslie A. Brueckner*; for Experts on Alcohol in the Workplace by *Vanya Hogen* and *Colette Routel*; for the National Congress of American Indians et al. by *David S. Case*, *Richard A. Guest*, *Carol H. Daniel*, and *Riyaz Kanji*; for the National Fisheries Institute by *John R. Hillsman*; for the Pacific Coast Federation of Fishermen's Associations et al. by *Amy J. Wildermuth*; for the Prince William Sound Regional Citizens' Advisory Council et al. by *William M. Walker*; for Former Ship Masters et al. by *Paul Edelman*; for Sociologists et al. by *Amy Howe* and *Kevin K. Russell*; for Trustees for Alaska et al. by *Howard A. Learner*; for Jean-Michel Cousteau et al. by *Gerson H. Smoger* and *Steven Bronson*; for Thomas J. Schoenbaum; and for United States Senator Theodore F. Stevens et al. by *Mr. Stevens*, *pro se*.

Briefs of *amici curiae* were filed for American Maritime Safety, Inc., by *Lee Seham*; for the American Petroleum Institute et al. by *Andrew L. Frey*, *Evan M. Tager*, *Nickolai G. Levin*, *Harry M. Ng*, *Janice K. Raburn*, *Donald D. Evans*, *Jan S. Amundson*, *Quentin Riegel*, and *Kevin M. Fong*; and for Arthur R. Miller by *Stanley D. Bernstein* and *Mr. Miller*, *pro se*.

without acquiescence in the actions causing harm, whether punitive damages have been barred implicitly by federal statutory law making no provision for them, and whether the award of $2.5 billion in this case is greater than maritime law should allow in the circumstances. We are equally divided on the owner's derivative liability, and hold that the federal statutory law does not bar a punitive award on top of damages for economic loss, but that the award here should be limited to an amount equal to compensatory damages.

I

On March 24, 1989, the supertanker *Exxon Valdez* grounded on Bligh Reef off the Alaskan coast, fracturing its hull and spilling millions of gallons of crude oil into Prince William Sound. The owner, petitioner Exxon Shipping Co. (now SeaRiver Maritime, Inc.), and its owner, petitioner Exxon Mobil Corp. (collectively, Exxon), have settled state and federal claims for environmental damage, with payments exceeding $1 billion, and this action by respondent Baker and others, including commercial fishermen and native Alaskans, was brought for economic losses to individuals dependent on Prince William Sound for their livelihoods.

A

The tanker was over 900 feet long and was used by Exxon to carry crude oil from the end of the Trans-Alaska Pipeline in Valdez, Alaska, to the lower 48 States. On the night of the spill it was carrying 53 million gallons of crude oil, or over a million barrels. Its captain was one Joseph Hazelwood, who had completed a 28-day alcohol treatment program while employed by Exxon, as his superiors knew, but dropped out of a prescribed followup program and stopped going to Alcoholics Anonymous meetings. According to the District Court, "[t]here was evidence presented to the jury that after Hazelwood was released from [residential treatment], he drank in bars, parking lots, apartments, airports,

airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers." *In re Exxon Valdez*, No. A89–0095–CV, Order No. 265 (D. Alaska, Jan. 27, 1995), p. 5, App. F to Pet. for Cert. 255a–256a (hereinafter Order 265). The jury also heard contested testimony that Hazelwood drank with Exxon officials and that members of the Exxon management knew of his relapse. See *ibid.* Although Exxon had a clear policy prohibiting employees from serving onboard within four hours of consuming alcohol, see *In re Exxon Valdez*, 270 F. 3d 1215, 1238 (CA9 2001), Exxon presented no evidence that it monitored Hazelwood after his return to duty or considered giving him a shoreside assignment, see Order 265, p. 5, *supra*, at 256a. Witnesses testified that before the *Valdez* left port on the night of the disaster, Hazelwood downed at least five double vodkas in the waterfront bars of Valdez, an intake of about 15 ounces of 80-proof alcohol, enough "that a non-alcoholic would have passed out." 270 F. 3d, at 1236.

The ship sailed at 9:12 p.m. on March 23, 1989, guided by a state-licensed pilot for the first leg out, through the Valdez Narrows. At 11:20 p.m., Hazelwood took active control and, owing to poor conditions in the outbound shipping lane, radioed the Coast Guard for permission to move east across the inbound lane to a less icy path. Under the conditions, this was a standard move, which the last outbound tanker had also taken, and the Coast Guard cleared the *Valdez* to cross the inbound lane. The tanker accordingly steered east toward clearer waters, but the move put it in the path of an underwater reef off Bligh Island, thus requiring a turn back west into the shipping lane around Busby Light, north of the reef.

Two minutes before the required turn, however, Hazelwood left the bridge and went down to his cabin in order, he said, to do paperwork. This decision was inexplicable. There was expert testimony that, even if their presence is not strictly necessary, captains simply do not quit the bridge during maneuvers like this, and no paperwork could have

justified it. And in fact the evidence was that Hazelwood's presence was required, both because there should have been two officers on the bridge at all times and his departure left only one, and because he was the only person on the entire ship licensed to navigate this part of Prince William Sound. To make matters worse, before going below Hazelwood put the tanker on autopilot, speeding it up, making the turn trickier, and any mistake harder to correct.

As Hazelwood left, he instructed the remaining officer, third mate Joseph Cousins, to move the tanker back into the shipping lane once it came abeam of Busby Light. Cousins, unlicensed to navigate in those waters, was left alone with helmsman Robert Kagan, a nonofficer. For reasons that remain a mystery, they failed to make the turn at Busby Light, and a later emergency maneuver attempted by Cousins came too late. The tanker ran aground on Bligh Reef, tearing the hull open and spilling 11 million gallons of crude oil into Prince William Sound.

After Hazelwood returned to the bridge and reported the grounding to the Coast Guard, he tried but failed to rock the *Valdez* off the reef, a maneuver which could have spilled more oil and caused the ship to founder.[1] The Coast Guard's nearly immediate response included a blood test of Hazelwood (the validity of which Exxon disputes) showing a blood-alcohol level of .061 11 hours after the spill. Supp. App. 307sa. Experts testified that to have this much alcohol in his bloodstream so long after the accident, Hazelwood at

[1] As it turned out, the tanker survived the accident and remained in Exxon's fleet, which it subsequently transferred to a wholly owned subsidiary, SeaRiver Maritime, Inc. The *Valdez* "was renamed several times, finally to the *SeaRiver Mediterranean*, [and] carried oil between the Persian Gulf and Japan, Singapore, and Australia for 12 years. . . . In 2002, the ship was pulled from service and 'laid up' off a foreign port (just where the owners won't say) and prepared for retirement, although, according to some reports, the vessel continues in service under a foreign flag." *Exxon Valdez* Spill Anniversary Marked, 30 Oil Spill Intelligence Report 2 (Mar. 29, 2007).

the time of the spill must have had a blood-alcohol level of around .241, Order 265, p. 5, *supra*, at 256a, three times the legal limit for driving in most States.

In the aftermath of the disaster, Exxon spent around $2.1 billion in cleanup efforts. The United States charged the company with criminal violations of the Clean Water Act, 33 U. S. C. §§ 1311(a) and 1319(c)(1); the Refuse Act of 1899, 33 U. S. C. §§ 407 and 411; the Migratory Bird Treaty Act, 16 U. S. C. §§ 703 and 707(a); the Ports and Waterways Safety Act, 33 U. S. C. § 1232(b)(1); and the Dangerous Cargo Act, 46 U. S. C. § 3718(b). Exxon pleaded guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act and agreed to pay a $150 million fine, later reduced to $25 million plus restitution of $100 million. A civil action by the United States and the State of Alaska for environmental harms ended with a consent decree for Exxon to pay at least $900 million toward restoring natural resources, and it paid another $303 million in voluntary settlements with fishermen, property owners, and other private parties.

B

The remaining civil cases were consolidated into this one against Exxon, Hazelwood, and others. The District Court for the District of Alaska divided the plaintiffs seeking compensatory damages into three classes: commercial fishermen, Native Alaskans, and landowners. At Exxon's behest, the court also certified a mandatory class of all plaintiffs seeking punitive damages, whose number topped 32,000. Respondents here, to whom we will refer as Baker for convenience, are members of that class.

For the purposes of the case, Exxon stipulated to its negligence in the *Valdez* disaster and its ensuing liability for compensatory damages. The court designed the trial accordingly: Phase I considered Exxon and Hazelwood's recklessness and thus their potential for punitive liability; Phase II set compensatory damages for commercial fishermen and

Native Alaskans; and Phase III determined the amount of punitive damages for which Hazelwood and Exxon were each liable. (A contemplated Phase IV, setting compensation for still other plaintiffs, was obviated by settlement.)

In Phase I, the jury heard extensive testimony about Hazelwood's alcoholism and his conduct on the night of the spill, as well as conflicting testimony about Exxon officials' knowledge of Hazelwood's backslide. At the close of Phase I, the court instructed the jury in part that

> "[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation." App. K to Pet. for Cert. 301a.

The court went on that "[a]n employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business." *Ibid.* Exxon did not dispute that Hazelwood was a managerial employee under this definition, see App. G, *id.*, at 264a, n. 8, and the jury found both Hazelwood and Exxon reckless and thus potentially liable for punitive damages, App. L, *id.*, at 303a.[2]

In Phase II, the jury awarded $287 million in compensatory damages to the commercial fishermen. After the court deducted released claims, settlements, and other payments, the

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[2]The jury was not asked to consider the possibility of any degree of fault beyond the range of reckless conduct. The record sent up to us shows that some thought was given to a trial plan that would have authorized jury findings as to greater degrees of culpability, see App. 164, but that plan was not adopted, whatever the reason; Baker does not argue this was error.

balance outstanding was $19,590,257. Meanwhile, most of the Native Alaskan class had settled their compensatory claims for $20 million, and those who opted out of that settlement ultimately settled for a total of around $2.6 million.

In Phase III, the jury heard about Exxon's management's acts and omissions arguably relevant to the spill. See App. 1291–1320, 1353–1367. At the close of evidence, the court instructed the jurors on the purposes of punitive damages, emphasizing that they were designed not to provide compensatory relief but to punish and deter the defendants. See App. to Brief in Opposition 12a–14a. The court charged the jury to consider the reprehensibility of the defendants' conduct, their financial condition, the magnitude of the harm, and any mitigating facts. *Id.*, at 15a. The jury awarded $5,000 in punitive damages against Hazelwood and $5 billion against Exxon.

On appeal, the Court of Appeals for the Ninth Circuit upheld the Phase I jury instruction on corporate liability for acts of managerial agents under Circuit precedent. See *In re Exxon Valdez*, 270 F. 3d, at 1236 (citing *Protectus Alpha Nav. Co.* v. *North Pacific Grain Growers, Inc.*, 767 F. 2d 1379 (CA9 1985)). With respect to the size of the punitive-damages award, however, the Circuit remanded twice for adjustments in light of this Court's due process cases before ultimately itself remitting the award to $2.5 billion. See 270 F. 3d, at 1246–1247; 472 F. 3d 600, 601, 625 (2006) *(per curiam)*, and 490 F. 3d 1066, 1068 (2007).

We granted certiorari to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents, whether the Clean Water Act (CWA), 86 Stat. 816, 33 U. S. C. § 1251 *et seq.* (2000 ed. and Supp. V), forecloses the award of punitive damages in maritime spill cases, and whether the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law. 552 U. S. 989 (2007). We now vacate and remand.

II

On the first question, Exxon says that it was error to instruct the jury that a corporation "is responsible for the reckless acts of . . . employees . . . in a managerial capacity while acting in the scope of their employment."[3] App. K to Pet. for Cert. 301a. The Courts of Appeals have split on this issue,[4] and the company relies primarily on two cases, *The Amiable Nancy*, 3 Wheat. 546 (1818), and *Lake Shore & Michigan Southern R. Co.* v. *Prentice*, 147 U. S. 101 (1893), to argue that this Court's precedents are clear that punitive damages are not available against a shipowner for a shipmaster's recklessness. The former was a suit in admiralty against the owners of *The Scourge*, a privateer whose officers and crew boarded and plundered a neutral ship, *The Amiable Nancy*. In upholding an award of compensatory damages, Justice Story observed that,

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[3] Baker emphasizes that the Phase I jury instructions also allowed the jury to find Exxon independently reckless, and that the evidence for fixing Exxon's punitive liability at Phase III revolved around the recklessness of company officials in supervising Hazelwood and enforcing Exxon's alcohol policies. Thus, Baker argues, it is entirely possible that the jury found Exxon reckless in its own right, and in no way predicated its liability for punitive damages on Exxon's responsibility for Hazelwood's conduct. Brief for Respondents 36–39.

The fact remains, however, that the jury was not required to state the basis of Exxon's recklessness, and the basis for the finding could have been Exxon's own recklessness or just Hazelwood's. Any error in instructing on the latter ground cannot be overlooked, because "when it is impossible to know, in view of the general verdict returned whether the jury imposed liability on a permissible or an impermissible ground, the judgment must be reversed and the case remanded." *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U. S. 6, 11 (1970) (internal quotation marks omitted).

[4] Compare *Protectus Alpha Nav. Co.* v. *North Pacific Grain Growers, Inc.*, 767 F. 2d 1379, 1386 (CA9 1985) (adopting Restatement (Second) of Torts rule), with *CEH, Inc.* v. *F/V Seafarer*, 70 F. 3d 694, 705 (CA1 1995); *In re P & E Boat Rentals, Inc.*, 872 F. 2d 642, 652 (CA5 1989); *United States Steel Corp.* v. *Fuhrman*, 407 F. 2d 1143, 1148 (CA6 1969).

> "if this were a suit against the original wrong-doers, it might be proper to . . . visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can *scarcely ever* be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion, that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." *The Amiable Nancy*, *supra*, at 558–559 (emphasis in original).

Exxon takes this statement as a rule barring punitive liability against shipowners for actions by underlings not "directed," "countenanced," or "participated in" by the owners.

Exxon further claims that the Court confirmed this rule in *Lake Shore*, *supra*, a railway case in which the Court relied on *The Amiable Nancy* to announce, as a matter of pre-*Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), general common law, that "[t]hough [a] principal is liable to make compensation for [intentional torts] by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate." 147 U. S., at 110. Because maritime law remains federal common law, and because the Court has never revisited the issue, Exxon argues that *Lake Shore* endures as sound evidence of maritime law. And even if the rule of *Amiable Nancy* and *Lake Shore* does not control, Exxon urges the Court to fall back to a modern-day variant adopted in the context of Title VII of the Civil Rights Act of 1964 in *Kolstad* v. *American Dental Assn.*, 527 U. S. 526, 544 (1999),

that employers are not subject to punitive damages for discriminatory conduct by their managerial employees if they can show that they maintained and enforced good-faith anti-discrimination policies.

Baker supports the Ninth Circuit in upholding the instruction, as it did on the authority of *Protectus Alpha Nav. Co.*, 767 F. 2d 1379, which followed the Restatement rule recognizing corporate liability in punitive damages for reckless acts of managerial employees, see 4 Restatement (Second) of Torts § 909(c) (1977) (hereinafter Restatement). Baker says that *The Amiable Nancy* offers nothing but dictum, because punitive damages were not at issue, and that *Lake Shore* merely rejected company liability for the acts of a railroad conductor, while saying nothing about liability for agents higher up the ladder, like ship captains. He also makes the broader point that the opinion was criticized for failing to reflect the majority rule of its own time, not to mention its conflict with the *respondeat superior* rule in the overwhelming share of land-based jurisdictions today. Baker argues that the maritime rule should conform to modern land-based common law, where a majority of States allow punitive damages for the conduct of any employee, and most others follow the Restatement, imposing liability for managerial agents.

The Court is equally divided on this question, and "[i]f the judges are divided, the reversal cannot be had, for no order can be made." *Durant* v. *Essex Co.*, 7 Wall. 107, 112 (1869). We therefore leave the Ninth Circuit's opinion undisturbed in this respect, though it should go without saying that the disposition here is not precedential on the derivative liability question. See, *e. g.*, *Neil* v. *Biggers*, 409 U. S. 188, 192 (1972); *Ohio ex rel. Eaton* v. *Price*, 364 U. S. 263, 264 (1960) (opinion of Brennan, J.).

III

Exxon next says that, whatever the availability of maritime punitive damages at common law, the CWA preempts them. Baker responds with both procedural and merits arguments, and although we do not dispose of the issue on pro-

cedure, a short foray into its history is worthwhile as a cautionary tale.

At the pretrial stage, the District Court controlled a flood of motions by an order staying them for any purpose except discovery. The court ultimately adopted a case-management plan allowing receipt of seven specific summary judgment motions already scheduled, and requiring a party with additional motions to obtain the court's leave. One of the motions scheduled sought summary judgment for Exxon on the ground that the Trans-Alaska Pipeline Authorization Act, 87 Stat. 584, 43 U. S. C. §§ 1651–1656, displaced maritime common law and foreclosed the availability of punitive damages. The District Court denied the motion.

After the jury returned the Phase III punitive-damages verdict on September 16, 1994, the parties stipulated that all post-trial Federal Rules of Civil Procedure 50 and 59 motions would be filed by September 30, and the court so ordered. App. 1410–1411. Exxon filed 11 of them, including several seeking a new trial or judgment as a matter of law on one ground or another going to the punitive-damages award, all of which were denied along with the rest. On October 23, 1995, almost 13 months after the stipulated motions deadline, Exxon moved for the District Court to suspend the motions stay, App. to Brief in Opposition 28a–29a, to allow it to file a "Motion and Renewed Motion . . . for Judgment on Punitive Damages Claims" under Rules 49(a) and 58(2) and, "to the extent they may be applicable, pursuant to Rules 50(b), 56(b), 56(d), 59(a), and 59(e),"[5] *id.*, at 30a–31a. Exxon's accompa-

[5] Most of the Rules under which Exxon sought relief are inapplicable on their face. See Fed. Rules Civ. Proc. 49(a), 56(b), (d), and 58(2). Rules 50 and 59 are less inapt: they allow, respectively, entry of judgment as a matter of law and alteration or amendment of the judgment. (At oral argument, counsel for Exxon ultimately characterized the motion as one under Rule 50. Tr. of Oral Arg. 25.)

But to say that Rules 50 and 59 are less inapt than the other Rules is a long way from saying they are apt. A motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a) before the case was submitted to the jury. See Rule 50(b); see also,

nying memorandum asserted that two recent cases, *Glynn* v. *Roy Al Boat Management Corp.*, 57 F. 3d 1495 (CA9 1995), and *Guevara* v. *Maritime Overseas Corp.*, 59 F. 3d 1496 (CA5 1995), suggested that the rule of maritime punitive damages was displaced by federal statutes, including the CWA. On November 2, 1995, the District Court summarily denied Exxon's request to file the motion, App. to Brief in Opposition 35a, and in January 1996 (following the settlement of the Phase IV compensatory claims) the court entered final judgment.

Exxon renewed the CWA preemption argument before the Ninth Circuit. The Court of Appeals recognized that Exxon had raised the CWA argument for the first time 13 months after the Phase III verdict, but decided that the claim "should not be treated as waived," because Exxon had "consistently argued statutory preemption" throughout the litigation, and the question was of "massive . . . significance" given the "ambiguous circumstances" of the case. 270 F. 3d, at 1229. On the merits, the Circuit held that the CWA did not preempt maritime common law on punitive damages. *Id.*, at 1230.

Although we agree with the Ninth Circuit's conclusion, its reasons for reaching it do not hold up. First, the reason the court thought that the CWA issue was not in fact waived was that Exxon had alleged other statutory grounds for preemption from the outset of the trial. But that is not enough.

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e. g., *Zachar* v. *Lee*, 363 F. 3d 70, 73–74 (CA1 2004); 9B C. Wright & A. Miller, Federal Practice and Procedure § 2537, pp. 603–604 (3d ed. 2008). Rule 59(e) permits a court to alter or amend a judgment, but it "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1, pp. 127–128 (2d ed. 1995) (footnotes omitted). Where Exxon has been unable to demonstrate that any Rule supported the motion, we need not choose the best of the worst, and risk implying that this last-minute motion was appropriate under any Rule. Suffice it to say that, whatever type of motion it was supposed to be, it was very, very late.

It is true that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992). But this principle stops well short of legitimizing Exxon's untimely motion. If "statutory preemption" were a sufficient claim to give Exxon license to rely on newly cited statutes anytime it wished, a litigant could add new constitutional claims as he went along, simply because he had "consistently argued" that a challenged regulation was unconstitutional. See *id.*, at 533 (rejecting substantive due process claim by takings petitioners who failed to preserve it below); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 277, n. 23 (1989) (rejecting due process claim by Eighth Amendment petitioners).

That said, the motion still addressed the Circuit's discretion, to which the "massive" significance of the question and the "ambiguous circumstances" of the case were said to be relevant. 270 F. 3d, at 1229. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below," *Singleton* v. *Wulff*, 428 U. S. 106, 120 (1976), when to deviate from this rule being a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *id.*, at 121. We have previously stopped short of stating a general principle to contain appellate courts' discretion, see *ibid.*, and we exercise the same restraint today.[6]

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[6] We do have to say, though, that the Court of Appeals gave short shrift to the District Court's commendable management of this gargantuan litigation, and if the case turned on the propriety of the Circuit's decision to reach the preemption issue we would take up the claim that it exceeded its discretion. Instead, we will only say that to the extent the Ninth Circuit implied that the unusual circumstances of this case called for an exception to regular practice, we think the record points the other way.

Of course the Court of Appeals was correct that the case was complex and significant, so much so, in fact, that the District Court was fairly

As to the merits, we agree with the Ninth Circuit that Exxon's late-raised CWA claim should fail. There are two ways to construe Exxon's argument that the CWA's penalties for water pollution, see 33 U. S. C. § 1321 (2000 ed. and Supp. V), preempt the common law punitive-damages remedies at issue here. The company could be saying that any tort action predicated on an oil spill is preempted unless § 1321 expressly preserves it. Section 1321(b) (2000 ed.) protects "the navigable waters of the United States, adjoining shorelines, . . . [and] natural resources" of the United States, subject to a saving clause reserving "obligations . . . under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil," § 1321(*o*). Exxon could be arguing that, because the saving clause makes no mention of preserving punitive damages for economic loss, they are preempted. But so, of course, would a number of other categories of damages awards that Exxon did not claim were preempted. If Exxon were correct here, there would be preemption of provisions for compensatory damages for thwarting economic activity or, for that matter, compensatory damages for physical, personal injury from oil spills or other water pollution. But we find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources"

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required to divide it into four phases, to oversee a punitive-damages class of 32,000 people, and to manage a motions industry that threatened to halt progress completely. But the complexity of a case does not eliminate the value of waiver and forfeiture rules, which ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression. "The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." *Poliquin* v. *Garden Way, Inc.*, 989 F. 2d 527, 531 (CA1 1993) (Boudin, J.) (citation omitted). The District Court's sensible efforts to impose order upon the issues in play and the progress of the trial deserve our respect.

was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.

Perhaps on account of its overbreadth, Exxon disclaims taking this position, admitting that the CWA does not displace compensatory remedies for consequences of water pollution, even those for economic harms. See, *e. g.*, Reply Brief for Petitioners 15–16. This concession, however, leaves Exxon with the equally untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. But nothing in the statutory text points to fragmenting the recovery scheme this way, and we have rejected similar attempts to sever remedies from their causes of action. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 255–256 (1984). All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies, see, *e. g.*, *United States* v. *Texas*, 507 U. S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law" (internal quotation marks omitted)); nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption.[7]

IV

Finally, Exxon raises an issue of first impression about punitive damages in maritime law, which falls within a federal court's jurisdiction to decide in the manner of a common law

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[7] In this respect, this case differs from two invoked by Exxon, *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981), and *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981), where plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the CWA. Here, Baker's private claims for economic injury do not threaten similar interference with federal regulatory goals with respect to "water," "shorelines," or "natural resources."

court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result. See U. S. Const., Art. III, § 2, cl. 1; see, *e. g.*, *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 259 (1979) ("Admiralty law is judge-made law to a great extent"); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 360–361 (1959) (constitutional grant "empowered the federal courts . . . to continue the development of [maritime] law"). In addition to its resistance to derivative liability for punitive damages and its preemption claim already disposed of, Exxon challenges the size of the remaining $2.5 billion punitive-damages award. Other than its preemption argument, it does not offer a legal ground for concluding that maritime law should never award punitive damages, or that none should be awarded in this case, but it does argue that this award exceeds the bounds justified by the punitive-damages goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm. The claim goes to our understanding of the place of punishment in modern civil law and reasonable standards of process in administering punitive law, subjects that call for starting with a brief account of the history behind today's punitive damages.

A

The modern Anglo-American doctrine of punitive damages dates back at least to 1763, when a pair of decisions by the Court of Common Pleas recognized the availability of damages "for more than the injury received." *Wilkes* v. *Wood*, Lofft 1, 18, 98 Eng. Rep. 489, 498 (1763) (Lord Chief Justice Pratt). In *Wilkes* v. *Wood*, one of the foundations of the Fourth Amendment, exemplary damages awarded against the Secretary of State, responsible for an unlawful search of John Wilkes's papers, were a spectacular £4,000. See generally *Boyd* v. *United States*, 116 U. S. 616, 626 (1886). And in *Huckle* v. *Money*, 2 Wils. 205, 206–207, 95 Eng. Rep. 768, 768–769 (K. B. 1763), the same judge who is recorded in

Wilkes gave an opinion upholding a jury's award of £300 (against a government officer again) although "if the jury had been confined by their oath to consider the mere personal injury only, perhaps [£20] damages would have been thought damages sufficient."

Awarding damages beyond the compensatory was not, however, a wholly novel idea even then, legal codes from ancient times through the Middle Ages having called for multiple damages for certain especially harmful acts. See, *e. g.*, Code of Hammurabi §8, p. 13 (R. Harper ed. 1904) (tenfold penalty for stealing the goat of a freed man); Statute of Gloucester, 1278, 6 Edw. I, ch. 5, 1 Stat. at Large 66 (treble damages for waste). But punitive damages were a common law innovation untethered to strict numerical multipliers, and the doctrine promptly crossed the Atlantic, see, *e. g.*, *Genay* v. *Norris*, 1 S. C. L. 6, 7 (1784); *Coryell* v. *Colbaugh*, 1 N. J. L. 77 (1791), to become widely accepted in American courts by the middle of the 19th century, see, *e. g.*, *Day* v. *Woodworth*, 13 How. 363, 371 (1852).

B

Early common law cases offered various rationales for punitive-damages awards, which were then generally dubbed "exemplary," implying that these verdicts were justified as punishment for extraordinary wrongdoing, as in Wilkes's case. Sometimes, though, the extraordinary element emphasized was the damages award itself, the punishment being "for example's sake," *Tullidge* v. *Wade*, 3 Wils. 18, 19, 95 Eng. Rep. 909 (K. B. 1769) (Lord Chief Justice Wilmot), "to deter from any such proceeding for the future," *Wilkes*, *supra*, at 19, 98 Eng. Rep., at 498–499. See also *Coryell*, *supra*, at 77 (instructing the jury "to give damages for *example's* sake, to prevent such offences in [the] future").

A third historical justification, which showed up in some of the early cases, has been noted by recent commentators, and that was the need "to compensate for intangible injuries,

compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."[8] *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 437–438, n. 11 (2001) (citing, *inter alia*, Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517 (1957)). But see Sebok, What Did Punitive Damages Do? 78 Chi.-Kent L. Rev. 163, 204 (2003) (arguing that "punitive damages have never served the compensatory function attributed to them by the Court in *Cooper*"). As the century progressed, and "the types of compensatory damages available to plaintiffs . . . broadened," *Cooper Industries*, *supra*, at 438, n. 11, the consequence was that American courts tended to speak of punitive damages as separate and distinct from compensatory damages, see, *e. g.*, *Day*, *supra*, at 371 (punitive damages "hav[e] in view the enormity of [the] offence rather than the measure of compensation to the plaintiff"). See generally 1 L. Schlueter, Punitive Damages §§ 1.3(C)–(D), 1.4(A) (5th ed. 2005) (hereinafter Schlueter) (describing the "almost total eclipse of the compensatory function" in the decades following the 1830s).

Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.[9] This consensus informs the doctrine in most

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[8] Indeed, at least one 19th-century treatise writer asserted that there was "no doctrine of authentically 'punitive' damages" and that "judgments that ostensibly included punitive damages [were] in reality no more than full compensation." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 25 (1991) (SCALIA, J., concurring in judgment) (citing 2 S. Greenleaf, Law of Evidence 235, n. 2 (13th ed. 1876)). "This view," however, "was not widely shared." *Haslip*, *supra*, at 25 (SCALIA, J., concurring in judgment) (citing other prominent 19th-century treatises). Whatever the actual importance of the subterfuge for compensation may have been, it declined.

[9] See, *e. g.*, *Moskovitz* v. *Mount Sinai Medical Center*, 69 Ohio St. 3d 638, 651, 635 N. E. 2d 331, 343 (1994) ("The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct");

modern American jurisdictions, where juries are customarily instructed on twin goals of punitive awards. See, *e. g.*, Cal. Jury Instr., Civil, No. 14.72.2 (2008) ("You must now determine whether you should award punitive damages against defendant[s] . . . for the sake of example and by way of punishment"); N. Y. Pattern Jury Instr., Civil, No. 2:278 (2007) ("The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant . . . and thereby to discourage the defendant . . . from acting in a similar way in the future"). The prevailing rule in American courts also limits punitive damages to cases of what the Court in *Day*, *supra*, at 371, spoke of as "enormity," where a defendant's conduct is "outrageous," 4 Restatement §908(2), owing to "gross negligence," "willful, wanton, and reckless indifference for the rights of others," or behavior even more deplorable, 1 Schlueter §9.3(A).[10]

Under the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent. Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it. See, *e. g.*, 2 Restatement §500, Comment *a*, pp. 587–588 (1964) ("Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high

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Hamilton Development Co. v. *Broad Rock Club, Inc.*, 248 Va. 40, 45, 445 S. E. 2d 140, 143 (1994) (same); *Loitz* v. *Remington Arms Co.*, 138 Ill. 2d 404, 414, 563 N. E. 2d 397, 401 (1990) (same); *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 222 (Ala. 1989) (same); *Masaki* v. *General Motors Corp.*, 71 Haw. 1, 6, 780 P. 2d 566, 570 (1989) (same); see also *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 432 (2001) (punitive damages are "intended to punish the defendant and to deter future wrongdoing"); *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 416 (2003) ("[P]unitive damages . . . are aimed at deterrence and retribution"); 4 Restatement §908, Comment *a*.

[10] These standards are from the torts context; different standards apply to other causes of action.

degree of risk of . . . harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so"). Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure. See 4 *id.*, § 908, Comment *e*, p. 466 (1977) ("In determining the amount of punitive damages, . . . the trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer . . . "); cf. Alaska Stat. § 09.17.020(g) (2006) (higher statutory limit applies where conduct was motivated by financial gain and its adverse consequences were known to the defendant); Ark. Code Ann. § 16–55–208(b) (2005) (statutory limit does not apply where the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage).

Regardless of culpability, however, heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it), see, *e. g.*, *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 582 (1996) ("A higher ratio may also be justified in cases in which the injury is hard to detect"), or when the value of injury and the corresponding compensatory award are small (providing low incentives to sue), see, *e. g.*, *ibid.* ("[L]ow awards of compensatory damages may properly support a higher ratio . . . if, for example, a particularly egregious act has resulted in only a small amount of economic damages"); 4 Restatement § 908, Comment *c*, p. 465 ("Thus an award of nominal damages . . . is enough to support a further award of punitive damages, when a tort . . . is committed for an outrageous purpose, but no significant harm has resulted"). And, with a broadly analogous object, some regulatory schemes provide by statute for multiple recovery in order to

induce private litigation to supplement official enforcement that might fall short if unaided. See, *e. g.*, *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 344 (1979) (discussing antitrust treble damages).

C

State regulation of punitive damages varies. A few States award them rarely, or not at all. Nebraska bars punitive damages entirely, on state constitutional grounds. See, *e. g.*, *Distinctive Printing & Packaging Co.* v. *Cox*, 232 Neb. 846, 857, 443 N. W. 2d 566, 574 (1989) *(per curiam)*. Four others permit punitive damages only when authorized by statute: Louisiana, Massachusetts, and Washington as a matter of common law, and New Hampshire by statute codifying common law tradition. See *Ross* v. *Conoco, Inc.*, 02–0299, p. 14 (La. 10/15/02), 828 So. 2d 546, 555; *Flesner* v. *Technical Communications Corp.*, 410 Mass. 805, 813, 575 N. E. 2d 1107, 1112 (1991); *Fisher Properties, Inc.* v. *Arden-Mayfair, Inc.*, 106 Wash. 2d 826, 852, 726 P. 2d 8, 23 (1986); N. H. Rev. Stat. Ann. §507:16 (1997); see also *Fay* v. *Parker*, 53 N. H. 342, 382 (1872). Michigan courts recognize only exemplary damages supportable as compensatory, rather than truly punitive, see *Peisner* v. *Detroit Free Press, Inc.*, 104 Mich. App. 59, 68, 304 N. W. 2d 814, 817 (1981), while Connecticut courts have limited what they call punitive recovery to the "expenses of bringing the legal action, including attorney's fees, less taxable costs," *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 517, n. 38, 656 A. 2d 1009, 1029, n. 38 (1995).

As for procedure, in most American jurisdictions the amount of the punitive award is generally determined by a jury in the first instance, and that "determination is then reviewed by trial and appellate courts to ensure that it is reasonable." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 15 (1991); see also *Honda Motor Co.* v. *Oberg*, 512 U. S. 415, 421–426 (1994).[11] Many States have gone further by

[11] A like procedure was followed in this case, without objection.

imposing statutory limits on punitive awards, in the form of absolute monetary caps, see, *e. g.*, Va. Code Ann. §8.01–38.1 (Lexis 2007) ($350,000 cap), a maximum ratio of punitive to compensatory damages, see, *e. g.*, Ohio Rev. Code Ann. §2315.21(D)(2)(a) (Lexis 2001) (2:1 ratio in most tort cases), or, frequently, some combination of the two, see, *e. g.*, Alaska Stat. §09.17.020(f) (2006) (greater of 3:1 ratio or $500,000 in most actions). The States that rely on a multiplier have adopted a variety of ratios, ranging from 5:1 to 1:1.[12]

Despite these limitations, punitive damages overall are higher and more frequent in the United States than they are anywhere else. See, *e. g.*, Gotanda, Punitive Damages: A Comparative Analysis, 42 Colum. J. Transnat'l L. 391, 421 (2004); 2 Schlueter §22.0. In England and Wales, punitive, or exemplary, damages are available only for oppressive, arbitrary, or unconstitutional action by government servants; injuries designed by the defendant to yield a larger profit than the likely cost of compensatory damages; and conduct for which punitive damages are expressly authorized by statute. *Rookes* v. *Barnard*, [1964] 1 All E. R. 367, 410–411 (H. L.). Even in the circumstances where punitive damages are allowed, they are subject to strict, judicially imposed guidelines. The Court of Appeal in *Thompson* v. *Commissioner of Police of Metropolis*, [1998] Q. B. 498, 518, said that

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[12] See, *e. g.*, Mo. Rev. Stat. Ann. §510.265(1) (Vernon Supp. 2008) (greater of 5:1 or $500,000 in most cases); Ala. Code §§6–11–21(a), (d) (2005) (greater of 3:1 or $1.5 million in most personal injury suits, and 3:1 or $500,000 in most other actions); N. D. Cent. Code Ann. §32–03.2–11(4) (Supp. 2007) (greater of 2:1 or $250,000); Colo. Rev. Stat. Ann. §13–21–102(1)(a) (2007) (1:1).

Oklahoma has a graduated scheme, with the limit on the punitive award turning on the nature of the defendant's conduct. See Okla. Stat., Tit. 23, §9.1(B) (West 2001) (greater of 1:1 or $100,000 in cases involving "reckless disregard"); §9.1(C) (greater of 2:1, $500,000, or the financial benefit derived by the defendant, in cases of intentional and malicious conduct); §9.1(D) (no limit where the conduct is intentional, malicious, and life threatening).

a ratio of more than three times the amount of compensatory damages will rarely be appropriate; awards of less than £5,000 are likely unnecessary; awards of £25,000 should be exceptional; and £50,000 should be considered the top.

For further contrast with American practice, Canada and Australia allow exemplary damages for outrageous conduct, but awards are considered extraordinary and rarely issue. See 2 Schlueter §§22.1(B), (D). Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland. See *id.*, §§22.2(A)–(C), (E). And some legal systems not only decline to recognize punitive damages themselves but refuse to enforce foreign punitive judgments as contrary to public policy. See, *e. g.*, Gotanda, Charting Developments Concerning Punitive Damages: Is the Tide Changing? 45 Colum. J. Transnat'l L. 507, 514, 518, 528 (2007) (noting refusals to enforce judgments by Japanese, Italian, and German courts, positing that such refusals may be on the decline, but concluding, "American parties should not anticipate smooth sailing when seeking to have a domestic punitive damages award recognized and enforced in other countries").

D

American punitive damages have been the target of audible criticism in recent decades, see, *e. g.*, Note, Developments, The Paths of Civil Litigation, 113 Harv. L. Rev. 1783, 1784–1788 (2000) (surveying criticism), but the most recent studies tend to undercut much of it, see *id.*, at 1787–1788. A survey of the literature reveals that discretion to award punitive damages has not mass-produced runaway awards, and although some studies show the dollar amounts of punitive-damages awards growing over time, even in real terms,[13] by

[13] See, *e. g.*, RAND Institute for Civil Justice, D. Hensler & E. Moller, Trends in Punitive Damages, table 2 (Mar. 1995) (finding an increase in median awards between the early 1980s and the early 1990s in San Francisco and Cook Counties); Moller, Pace, & Carroll, Punitive Damages in

most accounts the median ratio of punitive to compensatory awards has remained less than 1:1.[14] Nor do the data substantiate a marked increase in the percentage of cases with punitive awards over the past several decades.[15] The fig-

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Financial Injury Jury Verdicts, 28 J. Legal Studies 283, 307 (1999) (hereinafter Financial Injury Jury Verdicts) (studying jury verdicts in "Financial Injury" cases in six States and Cook County, Illinois, and finding a marked increase in the median award between the late 1980s and the early 1990s); RAND Institute for Civil Justice, M. Peterson, S. Sarma, & M. Shanley, Punitive Damages: Empirical Findings 15 (1987) (hereinafter Punitive Damages: Empirical Findings) (finding that the median punitive award increased nearly 4 times in San Francisco County between the early 1960s and the early 1980s, and 43 times in Cook County over the same period). But see T. Eisenberg et al., Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data, 3 J. of Empirical Legal Studies 263, 278 (2006) (hereinafter Juries, Judges, and Punitive Damages) (analyzing Bureau of Justice Statistics data from 1992, 1996, and 2001, and concluding that "[n]o statistically significant variation exists in the inflation-adjusted punitive award level over the three time periods"); Dept. of Justice, Bureau of Justice Statistics, T. Cohen, Punitive Damage Awards in Large Counties, 2001, p. 8 (Mar. 2005) (hereinafter Cohen) (compiling data from the Nation's 75 most populous counties and finding that the median punitive-damages award in civil jury trials decreased between 1992 and 2001).

[14] See, *e. g.*, Juries, Judges, and Punitive Damages 269 (reporting median ratios of 0.62:1 in jury trials and 0.66:1 in bench trials using the Bureau of Justice Statistics data from 1992, 1996, and 2001); Vidmar & Rose, Punitive Damages by Juries in Florida, 38 Harv. J. Legis. 487, 492 (2001) (studying civil cases in Florida state courts between 1989 and 1998 and finding a median ratio of 0.67:1). But see Financial Injury Jury Verdicts 307 (finding a median ratio of 1.4:1 in "financial injury" cases in the late 1980s and early 1990s).

[15] See, *e. g.*, Cohen 8 (compiling data from the Nation's 75 most populous counties, and finding that in jury trials where the plaintiff prevailed, the percentage of cases involving punitive awards was 6.1% in 1992 and 5.6% in 2001); Financial Injury Jury Verdicts 307 (finding a statistically significant decrease in the percentage of verdicts in "financial injury" cases that include a punitive-damages award, from 15.8% in the early 1980s to 12.7% in the early 1990s). But see Punitive Damages: Empirical Findings 9 (finding an increase in the percentage of civil trials resulting in punitive-

ures thus show an overall restraint and suggest that in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter.

The real problem, it seems, is the stark unpredictability of punitive awards. Courts of law are concerned with fairness as consistency, and evidence that the median ratio of punitive to compensatory awards falls within a reasonable zone, or that punitive awards are infrequent, fails to tell us whether the spread between high and low individual awards is acceptable. The available data suggest it is not. A recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just 0.62:1, but a mean ratio of 2.90:1 and a standard deviation of 13.81. Juries, Judges, and Punitive Damages 269.[16] Even to those of us unsophisticated in sta-

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damages awards in San Francisco and Cook Counties between 1960 and 1984).

One might posit that ill effects of punitive damages are clearest not in actual awards but in the shadow that the punitive regime casts on settlement negotiations and other litigation decisions. See, *e. g.*, Financial Injury Jury Verdicts 287; Polinsky, Are Punitive Damages Really Insignificant, Predictable, and Rational? 26 J. Legal Studies 663, 664–671 (1997). But here again the data have not established a clear correlation. See, *e. g.*, Eaton, Mustard, & Talarico, The Effects of Seeking Punitive Damages on the Processing of Tort Claims, 34 J. Legal Studies 343, 357, 353–354, 365 (2005) (studying data from six Georgia counties and concluding that "the decision to seek punitive damages has no statistically significant impact" on "whether a case that was disposed was done so by trial or by some other procedure, including settlement," or "whether a case that was disposed by means other than a trial was more likely to have been settled"); Kritzer & Zemans, The Shadow of Punitives, 1998 Wis. L. Rev. 157, 160 (noting the theory that punitive damages cast a large shadow over settlement negotiations, but finding that "with perhaps one exception, what little systematic evidence we could find does not support the notion" (emphasis deleted)).

[16]This study examined "the most representative sample of state court trials in the United States," involving "tort, contract, and property cases disposed of by trial in fiscal year 1991–1992 and then calendar years 1996

tistics, the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories. The distribution of awards is narrower, but still remarkable, among punitive damages assessed by judges: the median ratio is 0.66:1, the mean ratio is 1.60:1, and the standard deviation is 4.54. *Ibid.* Other studies of some of the same data show that fully 14% of punitive awards in 2001 were greater than four times the compensatory damages, see Cohen 5, with 18% of punitives in the 1990s more than trebling the compensatory damages, see Ostrom, Rottman, & Goerdt, A Step Above Anecdote: A Profile of the Civil Jury in the 1990s, 79 Judicature 233, 240 (1996). And a study of "financial injury" cases using a different data set found that 34% of the punitive awards were greater than three times the corresponding compensatory damages. Financial Injury Jury Verdicts 333.

Starting with the premise of a punitive-damages regime, these ranges of variation might be acceptable or even desirable if they resulted from judges' and juries' refining their judgments to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts. Cf. *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 457–458 (1993) (plurality opinion). But anecdotal evidence suggests that nothing of that sort is going on. One of our own leading cases on punitive damages, with a $4 million verdict by an Alabama jury, noted that a second Alabama case with strikingly similar facts produced "a comparable amount of compensatory damages" but "no punitive damages at all." See *Gore*, 517 U. S., at 565, n. 8. As the Supreme Court of Alabama candidly

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and 2001. The three separate data sets cover state courts of general jurisdiction in a random sample of 46 of the 75 most populous counties in the United States." Juries, Judges, and Punitive Damages 267. The information was "gathered directly" from state-court clerks' offices and the study did "not rely on litigants or third parties to report." *Ibid.*

explained, "the disparity between the two jury verdicts . . . [w]as a reflection of the inherent uncertainty of the trial process." *BMW of North America, Inc.* v. *Gore*, 646 So. 2d 619, 626 (1994) *(per curiam)*. We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances.[17]

E

The Court's response to outlier punitive-damages awards has thus far been confined by claims at the constitutional level, and our cases have announced due process standards that every award must pass. See, *e. g.*, *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 425 (2003); *Gore*, 517 U. S., at 574–575. Although "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *id.*, at 582, we have determined that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," *State Farm*, 538 U. S., at 425; "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *ibid.*

Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we

[17] The Court is aware of a body of literature running parallel to anecdotal reports, examining the predictability of punitive awards by conducting numerous "mock juries," where different "jurors" are confronted with the same hypothetical case. See, *e. g.*, C. Sunstein, R. Hastie, J. Payne, D. Schkade, & W. Viscusi, Punitive Damages: How Juries Decide (2002); Schkade, Sunstein, & Kahneman, Deliberating About Dollars: The Severity Shift, 100 Colum. L. Rev. 1139 (2000); Hastie, Schkade, & Payne, Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards, 23 Law & Hum. Behav. 445 (1999); Sunstein, Kahneman, & Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 Yale L. J. 2071 (1998). Because this research was funded in part by Exxon, we decline to rely on it.

are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard. Our due process cases, on the contrary, have all involved awards subject in the first instance to state law. See, *e. g.*, *id.*, at 414 (fraud and intentional infliction of emotional distress under Utah law); *Gore*, *supra*, at 563, and n. 3 (fraud under Alabama law); *TXO*, *supra*, at 452 (plurality opinion) (slander of title under West Virginia law); *Haslip*, 499 U. S., at 7 (fraud under Alabama law). These, as state-law cases, could provide no occasion to consider a "common-law standard of excessiveness," *Browning-Ferris Industries*, 492 U. S., at 279, and the only matter of federal law within our appellate authority was the constitutional due process issue.

Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. See The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897). And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage.

Cf. *Koon* v. *United States*, 518 U. S. 81, 113 (1996) (noting the need "to reduce unjustified disparities" in criminal sentencing "and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice"). The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.

F

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With that aim ourselves, we have three basic approaches to consider, one verbal and two quantitative. As mentioned before, a number of state courts have settled on criteria for judicial review of punitive-damages awards that go well beyond traditional "shock the conscience" or "passion and prejudice" tests. Maryland, for example, has set forth a nonexclusive list of nine review factors under state common law that include "degree of heinousness," "the deterrence value of [the award]," and "[w]hether [the punitive award] bears a reasonable relationship to the compensatory damages awarded." *Bowden* v. *Caldor, Inc.*, 350 Md. 4, 25–39, 710 A. 2d 267, 277–284 (1998). Alabama has seven general criteria, such as "actual or likely harm [from the defendant's conduct]," "degree of reprehensibility," and "[i]f the wrongful conduct was profitable to the defendant." *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223–224 (1989) (internal quotation marks omitted). But see *McClain* v. *Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1236 (ND Ala. 2003) (noting but not deciding claim that post-trial review under *Green Oil* "is unconstitutionally vague and inadequate").

These judicial review criteria are brought to bear after juries render verdicts under instructions offering, at best, guidance no more specific for reaching an appropriate penalty. In Maryland, for example, which allows punitive damages for intentional torts and conduct characterized by "actual malice," *U. S. Gypsum Co.* v. *Mayor and City Council*

of Baltimore, 336 Md. 145, 185, 647 A. 2d 405, 424–425 (1994), juries may be instructed that

> "[a]n award for punitive damages should be:
>
> "(1) In an amount that will deter the defendant and others from similar conduct.
>
> "(2) Proportionate to the wrongfulness of the defendant's conduct and the defendant's ability to pay.
>
> "(3) But not designed to bankrupt or financially destroy a defendant." Md. Pattern Jury Instr., Civil, No. 10:13 (4th ed. 2007).

In Alabama, juries are instructed to fix an amount after considering "the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs." 1 Ala. Pattern Jury Instr., Civil, No. 23.21 (Supp. 2007).

These examples leave us skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers. Instructions can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage (the cost of medical treatment, say), and although judges in the States that take this approach may well produce just results by dint of valiant effort, our experience with attempts to produce consistency in the analogous business of criminal sentencing leaves us doubtful that anything but a quantified approach will work. A glance at the experience there will explain our skepticism.

The points of similarity are obvious. "[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law." *Browning-Ferris Industries*, *supra*, at 275.[18] See also

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[18] This observation is not at odds with the holding in *Browning-Ferris*, that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages. See 492 U. S., at 275. That conclusion did not reject the punitive nature of the damages, see *ibid.*, but rested entirely upon

1977 Restatement § 908, Comment *a*, at 464 (purposes of punitive damages are "the same" as "that of a fine imposed after a conviction of a crime"); 18 U. S. C. § 3553(a)(2) (requiring sentencing courts to consider, *inter alia*, "the need for the sentence imposed . . . to provide just punishment for the offense" and "to afford adequate deterrence to criminal conduct"); United States Sentencing Commission, Guidelines Manual § 1A1.1, comment. (Nov. 2007).

It is instructive, then, that in the last quarter century federal sentencing rejected an "indeterminate" system, with relatively unguided discretion to sentence within a wide range, under which "similarly situated offenders were sentenced [to], and did actually serve, widely disparate sentences."[19] Instead it became a system of detailed guidelines tied to exactly quantified sentencing results, under the authority of the Sentencing Reform Act of 1984, 18 U. S. C. § 3551 *et seq.* (2000 ed. and Supp. V).

The importance of this for us is that in the old federal sentencing system of general standards the cohort of even the most seasoned judicial penalty-givers defied consistency. Judges and defendants alike were "[l]eft at large, wandering in deserts of uncharted discretion," M. Frankel, Criminal Sentences: Law Without Order 7–8 (1973), which is very much the position of those imposing punitive damages today, be they judges or juries, except that they lack even a statutory maximum; their only restraint beyond a core sense of

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our conviction that "the concerns that animate the Eighth Amendment" were about "plac[ing] limits on the steps a government may take against an individual," *ibid.* Thus the Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Id.*, at 264. We noted the similarities of purpose between criminal penalties and punitive damages and distinguished the two on the basis of their differing levels of state involvement. See *id.*, at 275.

[19] Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. Crim. L. & C. 883, 895–899 (1990) (citing studies and congressional hearings).

fairness is the due process limit. This federal criminal-law development, with its many state parallels, strongly suggests that as long "as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary." *Mathias* v. *Accor Economy Lodging, Inc.*, 347 F. 3d 672, 678 (CA7 2003).

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This is why our better judgment is that eliminating unpredictable outlying punitive awards by more rigorous standards than the constitutional limit will probably have to take the form adopted in those States that have looked to the criminal-law pattern of quantified limits. One option would be to follow the States that set a hard dollar cap on punitive damages, see *supra*, at 495–496, a course that arguably would come closest to the criminal law, rather like setting a maximum term of years. The trouble is, though, that there is no "standard" tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board. And of course a judicial selection of a dollar cap would carry a serious drawback; a legislature can pick a figure, index it for inflation, and revisit its provision whenever there seems to be a need for further tinkering, but a court cannot say when an issue will show up on the docket again. See, *e. g.*, *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U. S. 523, 546–547 (1983) (declining to adopt a fixed formula to account for inflation in discounting future wages to present value, in light of the unpredictability of inflation rates and variation among lost-earnings cases).

The more promising alternative is to leave the effects of inflation to the jury or judge who assesses the value of actual loss, by pegging punitive to compensatory damages using a ratio or maximum multiple. See, *e. g.*, 2 ALI Enterprise Responsibility for Personal Injury: Reporters' Study 258 (1991) (hereinafter ALI Reporters' Study) ("[T]he compensatory

award in a successful case should be the starting point in calculating the punitive award"); ABA, Report of Special Comm. on Punitive Damages, Section of Litigation, Punitive Damages: A Constructive Examination 64–66 (1986) (recommending a presumptive punitive-to-compensatory damages ratio). As the earlier canvass of state experience showed, this is the model many States have adopted, see *supra*, at 496, and n. 12, and Congress has passed analogous legislation from time to time, as for example in providing treble damages in antitrust, racketeering, patent, and trademark actions, see 15 U. S. C. §§15, 1117 (2000 ed. and Supp. V); 18 U. S. C. §1964(c); 35 U. S. C. §284.[20] And of course the potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis. See, *e. g.*, *State Farm*, 538 U. S., at 425; *Gore*, 517 U. S., at 580.

Still, some will murmur that this smacks too much of policy and too little of principle. Cf. *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80, 83 (CA2 1961). But the answer rests on the fact that we are acting here in the position of a common law court of last review, faced with a perceived defect in a common law remedy. Traditionally, courts have accepted primary responsibility for reviewing punitive damages and thus for their evolution, and if, in the absence of legislation, judicially derived standards leave the door open to outlier punitive-damages awards, it is hard to see how the judiciary can wash its hands of a problem it created, simply by calling quantified standards legislative. See *State Farm*, *supra*, at 438 (GINSBURG, J., dissenting) ("In a legislative scheme or a state high court's design to cap punitive dam-

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[20] There are state counterparts of these federal statutes. See, *e. g.*, Conn. Gen. Stat. §52–560 (2007) (cutting or destroying a tree intended for use as a Christmas tree punishable by a payment to the injured party of five times the tree's value); Mass. Gen. Laws, ch. 91, §59A (West 2006) (discharging crude oil into a lake, river, tidal water, or flats subjects a defendant to double damages in tort).

ages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned"); 2 ALI Reporters' Study 257 (recommending adoption of ratio, "probably legislatively, although possibly judicially").

History certainly is no support for the notion that judges cannot use numbers. The 21-year period in the rule against perpetuities was a judicial innovation, see, *e. g.*, *Cadell* v. *Palmer*, 1 Clark & Finnelly 372, 6 Eng. Rep. 956, 963 (H. L. 1833), and so were exact limitations periods for civil actions, sometimes borrowing from statutes, see C. Preston & G. Newsom, Limitation of Actions 241–242 (2d ed. 1943), but often without any statutory account to draw on, see, *e. g.*, 1 H. Wood, Limitation of Actions § 1, p. 4 (4th D. Moore ed. 1916). For more examples, see 1 W. Blackstone, Commentaries on the Laws of England 451 (1765) (listing other common law age cutoffs with no apparent statutory basis). And of course, adopting an admiralty-law ratio is no less judicial than picking one as an outer limit of constitutionality for punitive awards. See *State Farm*, *supra*, at 425.[21]

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[21] To the extent that JUSTICE STEVENS suggests that the very subject of remedies should be treated as congressional in light of the number of statutes dealing with remedies, see *post*, at 516–519 (opinion concurring in part and dissenting in part), we think modern-day maritime cases are to the contrary and support judicial action to modify a common law landscape largely of our own making. The character of maritime law as a mixture of statutes and judicial standards, "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules," *East River S. S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858, 865 (1986), accounts for the large part we have taken in working out the governing maritime tort principles. See, *e. g.*, *ibid.* ("recognizing products liability . . . as part of the general maritime law"); *American Export Lines, Inc.* v. *Alvez*, 446 U. S. 274 (1980) (recognizing cause of action for loss of consortium); *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970) (recognizing cause of action for wrongful death). And for the very reason that our exercise of maritime jurisdiction has reached to creating new causes of action on more than one occasion, it follows that we have a free hand in dealing with an issue that is "entirely a remedial matter." *Id.*, at 382. The general observation we made in *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409 (1975), when we abrogated the admiralty

Although the legal landscape is well populated with examples of ratios and multipliers expressing policies of retribution and deterrence, most of them suffer from features that stand in the way of borrowing them as paradigms of reason-

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rule of divided damages in favor of proportional liability, is to the point here. It is urged "that the creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court. But the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." (Internal quotation marks and footnote omitted.) See also *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830 (1996) (holding that proportional-liability rule applies only to defendants proximately causing an injury); *McDermott, Inc.* v. *AmClyde*, 511 U. S. 202 (1994) (adopting proportionate-fault rule for calculation of nonsettling maritime tort defendants' compensatory liability).

Indeed, the compensatory remedy sought in this case is itself entirely a judicial creation. The common law traditionally did not compensate purely economic harms, unaccompanied by injury to person or property. See K. Abraham, Forms and Functions of Tort Law 247–248 (3d ed. 2007); see, *e. g.*, *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U. S. 449 (1925) (imposing rule in maritime context). But "[t]he courts have . . . occasionally created exceptions to the rule. Perhaps the most noteworthy involve cases in which there has been natural-resource damage for which no party seems to have a cause of action." Abraham, *supra*, at 249 (discussing *Union Oil Co.* v. *Oppen*, 501 F. 2d 558 (CA9 1974) (recognizing exception for commercial fishermen)). We raise the point not to express agreement or disagreement with the Ninth Circuit rule but to illustrate the entirely judge-made nature of the landscape we are surveying.

To be sure, "Congress retains superior authority in these matters," and "[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance." *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 27 (1990). But we may not slough off our responsibilities for common law remedies because Congress has not made a first move, and the absence of federal legislation constraining punitive damages does not imply a congressional decision that there should be no quantified rule, cf. *Rapanos* v. *United States*, 547 U. S. 715, 749 (2006) (plurality opinion) (noting the Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction"). Where there is a need for a new remedial maritime rule, past precedent argues for our setting a judicially derived standard, subject of course to congressional revision. See, *e. g.*, *Reliable Transfer*, *supra*, at 409.

able limitations suited for application to this case. While a slim majority of the States with a ratio have adopted 3:1, others see fit to apply a lower one, see, *e. g.*, Colo. Rev. Stat. Ann. §13–21–102(1)(a) (2007) (1:1); Ohio Rev. Code Ann. §2315.21(D)(2)(a) (Lexis 2005) (2:1), and a few have gone higher, see, *e. g.*, Mo. Ann. Stat. §510.265(1) (Supp. 2008) (5:1). Judgments may differ about the weight to be given to the slight majority of 3:1 States, but one feature of the 3:1 schemes dissuades us from selecting it here. With a few statutory exceptions, generally for intentional infliction of physical injury or other harm, see, *e. g.*, Ala. Code §6–11–21(j) (2005); Ark. Code Ann. §16–55–208(b) (2005), the States with 3:1 ratios apply them across the board (as do other States using different fixed multipliers). That is, the upper limit is not directed to cases like this one, where the tortious action was worse than negligent but less than malicious,[22] exposing the tortfeasor to certain regulatory sanctions and inevitable damages actions;[23] the 3:1 ratio in these States also applies to awards in quite different cases involving some of the most egregious conduct, including malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor's financial gain.[24] We confront, instead, a

[22] Although the jury heard evidence that Exxon may have felt constrained not to give Hazelwood a shoreside assignment because of a concern that such a course might open it to liabilities in personnel litigation the employee might initiate, see, *e. g.*, App. F to Pet. for Cert. 256a, such a consideration, if indeed it existed, hardly constitutes action taken with a specific purpose to cause harm at the expense of an established duty.

[23] We thus treat this case categorically as one of recklessness, for that was the jury's finding. But by making a point of its contrast with cases falling within categories of even greater fault we do not mean to suggest that Exxon's and Hazelwood's failings were less than reprehensible.

[24] Two of the States with 3:1 ratios do provide for slightly larger awards in actions involving this type of strategic financial wrongdoing, but the exceptions seem to apply to only a subset of those cases. See Alaska Stat. §09.17.020(g) (2006) (where the defendant's conduct was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy deci-

case of reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury. Thus, a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case.

For somewhat different reasons, the pertinence of the 2:1 ratio adopted by treble-damages statutes (offering compensatory damages plus a bounty of double that amount) is open to question. Federal treble-damages statutes govern areas far afield from maritime concerns (not to mention each other);[25] the relevance of the governing rules in patent or trademark cases, say, is doubtful at best. And in some instances, we know that the considerations that went into making a rule have no application here. We know, for example, that Congress devised the treble-damages remedy for private antitrust actions with an eye to supplementing official enforcement by inducing private litigation, which might otherwise have been too rare if nothing but compensatory damages were available at the end of the day. See, *e. g.*, *Reiter*, 442 U. S., at 344. That concern has no traction here, in this case of staggering damage inevitably provoking governmental enforcers to indict and any number of private parties to sue. To take another example, although 18 U. S. C. §3571(d)

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sions on behalf of the defendant, the normal limit is replaced by the greater of four times the compensatory damages, four times the aggregate financial gain the defendant received as a result of its misconduct, or $7 million); Fla. Stat. §§768.73(1)(b), (c) (2007) (normal limit replaced by greater of 4:1 or $2 million where defendant's wrongful conduct was motivated solely by unreasonable financial gain, and the unreasonably dangerous nature of the conduct, together with the high likelihood of injury, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant).

[25] See, *e. g.*, 15 U. S. C. §15 (antitrust); 18 U. S. C. §1964 (racketeering); 35 U. S. C. §284 (patent); 15 U. S. C. §1117 (2000 ed. and Supp. V) (trademark); 7 U. S. C. §2564 (plant variety protections); 12 U. S. C. §2607 (real estate settlement antikickback provision); 15 U. S. C. §1693f (consumer credit protection).

provides for a criminal penalty of up to twice a crime victim's loss, this penalty is an alternative to other specific fine amounts which courts may impose at their option, see §§3571(a)–(c), a fact that makes us wary of reading too much into Congress's choice of ratio in one provision. State environmental treble-damages schemes offer little more support: for one thing, insofar as some appear to punish even negligence, see, *e. g.*, Mass. Gen. Laws, ch. 130, §27 (2007), while others target only willful conduct, see, *e. g.*, Del. Code Ann., Tit. 25, §1401 (1989), some undershoot and others may overshoot the target here. For another, while some States have chosen treble damages, others punish environmental harms at other multiples. See, *e. g.*, N. H. Rev. Stat. Ann. §146–A:10 (2005) (damages of 1½ times the harm caused to private property by oil discharge); Minn. Stat. Ann. §115A.99 (2005) (civil penalty of 2 to 5 times the costs of removing unlawful solid waste). All in all, the legislative signposts do not point the way clearly to 2:1 as a sound indication of a reasonable limit.

3

There is better evidence of an accepted limit of reasonable civil penalty, however, in several studies mentioned before, showing the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of punitive awards. See *supra*, at 497–498, and n. 14. We think it is fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments about the economic penalties appropriate in their particular cases.

These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1, see *supra*, at 497–498, and n. 14, meaning that the compensatory award exceeds the punitive award in most cases. In a well-

functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards. It also seems fair to suppose that most of the unpredictable outlier cases that call the fairness of the system into question are above the median; in theory a factfinder's deliberation could go awry to produce a very low ratio, but we have no basis to assume that such a case would be more than a sport, and the cases with serious constitutional issues coming to us have naturally been on the high side, see, *e. g.*, *State Farm*, 538 U. S., at 425 (ratio of 145:1); *Gore*, 517 U. S., at 582 (ratio of 500:1). On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1[26] probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.[27]

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[26] See n. 14, *supra*, for the spread among studies.

[27] The reasons for this conclusion answer JUSTICE STEVENS's suggestion, *post*, at 521–522, that there is an adequate restraint in appellate abuse-of-discretion review of a trial judge's own review of a punitive jury award (or of a judge's own award in nonjury cases). We cannot see much promise of a practical solution to the outlier problem in this possibility. JUSTICE STEVENS would find no abuse of discretion in allowing the $2.5 billion balance of the jury's punitive verdict here, and yet that is about five times the size of the award that jury practice and our judgment would signal as reasonable in a case of this sort.

JUSTICE STEVENS also suggests that maritime tort law needs a quantified limit on punitive awards less than tort law generally because punitives

The provision of the CWA respecting daily fines confirms our judgment that anything greater would be excessive here and in cases of this type. Congress set criminal penalties of up to $25,000 per day for negligent violations of pollution restrictions, and up to $50,000 per day for knowing ones. 33 U. S. C. §§ 1319(c)(1), (2). Discretion to double the penalty for knowing action compares to discretion to double the civil liability on conduct going beyond negligence and meriting punitive treatment. And our explanation of the constitutional upper limit confirms that the 1:1 ratio is not too low. In *State Farm*, we said that a single-digit maximum is appro-

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may mitigate maritime law's less generous scheme of compensatory damages. *Post*, at 519–520. But the instructions in this case did not allow the jury to set punitives on the basis of any such consideration, see Jury Instruction No. 21, App. to Brief in Opposition 12a ("The purposes for which punitive damages are awarded are: (1) to punish a wrongdoer for extraordinary misconduct; and (2) to warn defendants and others and deter them from doing the same"), and the size of the underlying compensatory damages does not bespeak economic inadequacy; the case, then, does not support an argument that maritime compensatory awards need supplementing.

And this Court has long held that "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct." *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); see *supra*, at 492–493. Indeed, any argument for more generous punitive damages in maritime cases would call into question the maritime applicability of the constitutional limit on punitive damages as now understood, for we have tied that limit to a conception of punitive damages awarded entirely for a punitive, not quasi-compensatory, purpose. See, *e. g.*, *Philip Morris USA* v. *Williams*, 549 U. S. 346, 352 (2007) ("This Court has long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition'" (quoting *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 568 (1996))); *State Farm*, 538 U. S., at 416 ("[P]unitive damages . . . are aimed at deterrence and retribution"); *Cooper Industries*, 532 U. S., at 432 ("[C]ompensatory damages and punitive damages . . . serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered . . . . The latter . . . operate as 'private fines' intended to punish the defendant and to deter future wrongdoing").

priate in all but the most exceptional of cases, and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U. S., at 425.[28]

V

Applying this standard to the present case, we take for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. See *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002). A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.

We therefore vacate the judgment and remand the case for the Court of Appeals to remit the punitive-damages award accordingly.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the opinion of the Court, including the portions that refer to constitutional limits that prior opinions have imposed upon punitive damages. While I agree with the argumentation based upon those prior holdings, I continue to believe the holdings were in error. See *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 429 (2003) (SCALIA, J., dissenting).

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[28] The criterion of "substantial" takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit, a concern addressed by the opportunity for a class action when large numbers of potential plaintiffs are involved: in such cases, individual awards are not the touchstone, for it is the class option that facilitates suit, and a class recovery of $500 million is substantial. In this case, then, the constitutional outer limit may well be 1:1.

JUSTICE STEVENS, concurring in part and dissenting in part.

While I join Parts I, II, and III of the Court's opinion, I believe that Congress, rather than this Court, should make the empirical judgments expressed in Part IV. While maritime law "'is judge-made law to a great extent,'" *ante*, at 490 (quoting *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 259 (1979)), it is also statutory law to a great extent; indeed, "[m]aritime tort law is now dominated by federal statute." *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 36 (1990). For that reason, when we are faced with a choice between performing the traditional task of appellate judges reviewing the acceptability of an award of punitive damages, on the one hand, and embarking on a new lawmaking venture, on the other, we "should carefully consider whether [we], or a legislative body, are better equipped to perform the task at hand." *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 531 (1988) (STEVENS, J., dissenting).

Evidence that Congress has affirmatively chosen *not* to restrict the availability of a particular remedy favors adherence to a policy of judicial restraint in the absence of some special justification. The Court not only fails to offer any such justification, but also ignores the particular features of maritime law that may counsel against imposing the sort of limitation the Court announces today. Applying the traditional abuse-of-discretion standard that is well grounded in the common law, I would affirm the judgment of the Court of Appeals.

I

As we explained in *Miles* v. *Apex Marine Corp.*, 498 U. S., at 27, "an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." In light of the many statutes governing liability under admiralty law, the absence of any limitation on an award of the sort at issue in this case suggests that Congress

would *not* wish us to create a new rule restricting the liability of a wrongdoer like Exxon.

For example, the Limitation of Shipowners' Liability Act (Limitation Act), 46 U. S. C. App. § 183,[1] a statute that has been part of the fabric of our law since 1851, provides in relevant part:

> "The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, *without the privity or knowledge of such owner or owners*, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." § 183(a) (emphasis added).

This statute operates to shield from liability shipowners charged with wrongdoing committed without their privity or knowledge; the Limitation Act's protections thus render large punitive damages awards functionally unavailable in a wide swath of admiralty cases.[2] Exxon evidently did not

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[1] The Limitation Act is now codified as amended at 46 U. S. C. § 30505. See Pub. L. 109–304, § 6, 120 Stat. 1513.

[2] See *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U. S. 438, 446 (2001) ("Admiralty and maritime law includes a host of special rights, duties, rules, and procedures. . . . Among these provisions is the Limitation Act . . . . The Act allows a vessel owner to limit liability for damage or injury, occasioned without the owner's privity or knowledge, to the value of the vessel or the owner's interest in the vessel"); *Coryell* v. *Phipps*, 317 U. S. 406, 412 (1943) ("One who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied the benefit of the limitation as respects a loss incurred by an explosion during the period of storage, unless 'privity' or 'knowledge' are to become empty words").

invoke the protection of the Limitation Act because it recognized the futility of attempting to establish that it lacked "privity or knowledge" of Captain Hazelwood's drinking.[3] Although the existence of the Limitation Act does not resolve this case, the fact that Congress chose to provide such generous protection against liability without including a party like Exxon within that protection counsels against extending a similar benefit here.

The Limitation Act is only one of several statutes that point to this conclusion. In the Trans-Alaska Pipeline Authorization Act (TAPAA), 87 Stat. 584, 43 U. S. C. § 1651 *et seq.*, Congress altered the liability regime governing certain types of Alaskan oil spills, imposing strict liability but also capping recovery; notably, it did not restrict the availability of punitive damages.[4] (Exxon unsuccessfully argued that TAPAA precluded punitive damages at an earlier stage of this litigation, see App. 101–107.) And the Court today rightly decides that in passing the Clean Water Act, Con-

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[3] Testimony at an early phase of this protracted litigation confirmed as much. In a hearing before the District Court, one of Exxon's attorneys explained that his firm advised Exxon in 1989 that Exxon would "'never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood.'" App. to Brief in Opposition 43a.

[4] Although the issue has not been resolved by this Court, there is evidence that in passing TAPAA, Congress meant to prevent application of the Limitation Act to the trans-Alaskan transportation of oil. The House Conference Report includes the following passage:

"Under the Limitation of Liability Act of 1851 (46 U. S. C. 183), the owner of a vessel is entitled to limit his liability for property damage caused by the vessel . . . . The Conferees concluded that existing maritime law would not provide adequate compensation to all victims . . . in the event of the kind of catastrophe which might occur. Consequently, the Conferees established a rule of strict liability for damages from discharges of the oil transported through the trans-Alaska Pipeline up to $100,000,000." H. R. Conf. Rep. No. 93–624, p. 28 (1973).

See also *In re Glacier Bay*, 944 F. 2d 577, 583 (CA9 1991) ("[W]e hold that TAPAA implicitly repealed the Limitation Act with regard to the transportation of trans-Alaska oil").

gress did not displace or in any way diminish the availability of common-law punitive damages remedies. *Ante*, at 488–489.

The congressional choice not to limit the availability of punitive damages under maritime law should not be viewed as an invitation to make policy judgments on the basis of evidence in the public domain that Congress is better able to evaluate than is this Court.

II

The Court's analysis of the empirical data it has assembled is problematic for several reasons. First, I believe that the Court fails to recognize a unique feature of maritime law that may counsel against uncritical reliance on data from land-based tort cases: General maritime law limits the availability of compensatory damages. Some maritime courts bar recovery for negligent infliction of purely emotional distress, see 1 T. Schoenbaum, Admiralty and Maritime Law §5–15 (4th ed. 2004),[5] and, on the view of many courts, maritime law precludes recovery for purely "economic losses . . . absent direct physical damage to property or a proprietary interest," 2 *id.*, §14–7, at 124.[6] Under maritime law, then, more than in the land-tort context, punitive damages may

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[5] Schoenbaum explains that "[n]either the general maritime law nor the Jones Act recognizes a right to recover damages for negligent infliction of emotional distress unaccompanied by physical injury." Admiralty and Maritime Law §5–15, at 239. See also *Gough* v. *Natural Gas Pipeline Co. of Am.*, 996 F. 2d 763, 765 (CA5 1993) (purely emotional injuries are compensable under maritime law when maritime plaintiffs "satisfy the 'physical injury or impact rule'").

[6] The latter limitation has its roots in the "dry dock doctrine" of *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303 (1927) (opinion for the Court by Holmes, J.). See *Barber Lines A/S* v. *M/V Donau Maru*, 764 F. 2d 50 (CA1 1985) (opinion for the Court by Breyer, J.) (tracing the history and purposes of the doctrine, and resolving to adhere to its rule); see also *Louisiana ex rel. Guste* v. *M/V Testbank*, 752 F. 2d 1019, 1020 (CA5 1985) (en banc) (affirming rule denying recovery for economic loss absent "physical damage to a proprietary interest . . . in cases of unintentional maritime tort").

serve to compensate for certain sorts of intangible injuries not recoverable under the rubric of compensation.

We observed in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 438, n. 11 (2001):

> "Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time. . . . As the types of compensatory damages available to plaintiffs have broadened, see, *e. g.*, 1 J. Nates, C. Kimball, D. Axelrod, & R. Goldstein, Damages in Tort Actions §3.01[3][a] (2000) (pain and suffering are generally available as species of compensatory damages), the theory behind punitive damages has shifted toward a more purely punitive . . . understanding."

Although these sorts of intangible injuries are now largely a species of ordinary compensatory damages under general tort law, it appears that maritime law continues to treat such injuries as less than fully compensable, or not compensable at all. Accordingly, there may be less reason to limit punitive damages in this sphere than there would be in any other.

Second, both caps and ratios of the sort the Court relies upon in its discussion are typically imposed by legislatures, not courts. Although the Court offers a great deal of evidence that States have acted in various ways to limit punitive damages, it is telling that the Court fails to identify a single state *court* that has imposed a precise ratio, as the Court does today, under its common-law authority. State legislatures have done so, of course; and indeed Congress would encounter no obstacle to doing the same as a matter of federal law. But Congress is far better situated than is this Court to assess the empirical data, and to balance competing policy interests, before making such a choice.[7]

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[7] See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 665–666 (1994) (plurality opinion) ("As an institution . . . Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of

The Court concedes that although "American punitive damages have been the target of audible criticism in recent decades," "most recent studies tend to undercut much of [that criticism]." *Ante*, at 497. It further acknowledges that "[a] survey of the literature reveals that discretion to award punitive damages has not mass-produced runaway awards." *Ibid.* The Court concludes that the real problem is large *outlier* awards, and the data seem to bear this out. But the Court never explains why abuse-of-discretion review is not the precise antidote to the unfairness inherent in such excessive awards.

Until Congress orders us to impose a rigid formula to govern the award of punitive damages in maritime cases, I would employ our familiar abuse-of-discretion standard: "If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination under an abuse-of-discretion standard,'" *Cooper Industries, Inc.*, 532 U. S., at 433; see also *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 15 (1991)

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data bearing upon an issue as complex and dynamic as that presented here" (internal quotation marks omitted)); *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 513 (1982) (when "relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them[, t]he very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable").

The Court points to *United States* v. *Reliable Transfer Co.*, 421 U. S. 397 (1975), a case in which the Court adopted a rule of proportional liability in maritime tort cases, as an illustrative example of the Court's power to craft "flexible and fair remedies in the law maritime." *Id.*, at 409. In that case, however, the Court noted that not only was the new proportional liability rule not barred by any "statutory or judicial precept," but also that its adoption would "simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by Congress for personal injury cases." *Ibid.* By contrast, the Court in this case has failed to demonstrate that adoption of the rule it announces brings the maritime law into line with expressions of congressional intent in this (or any other) context.

("Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable").

On an abuse-of-discretion standard, I am persuaded that a reviewing court should not invalidate this award.[8] In light of Exxon's decision to permit a lapsed alcoholic to command a supertanker carrying tens of millions of gallons of crude oil through the treacherous waters of Prince William Sound, thereby endangering all of the individuals who depended upon the sound for their livelihoods, the jury could reasonably have given expression to its "moral condemnation" of Exxon's conduct in the form of this award. *Cooper Industries, Inc.*, 532 U. S., at 432.

I would adhere to the principle that "'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'" *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 387 (1970) (quoting Chief Justice Chase in *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865)).

* * *

While I do not question that the Court possesses the power to craft the rule it announces today, in my judgment

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[8]The idiosyncratic posture of this case makes true abuse-of-discretion appellate review something of a counterfactual, since the $5 billion award returned by the jury was, after several intervening steps, ultimately remitted to $2.5 billion by the Ninth Circuit in order to conform with this Court's due process cases. 472 F. 3d 600 (2006) *(per curiam)*. Suffice it to say, for now, that although the constitutional limits and the abuse-of-discretion standard are not identical, in this case the $2.5 billion the Ninth Circuit believed survived *de novo* constitutional scrutiny would, in my judgment, also satisfy abuse-of-discretion review.

it errs in doing so. Accordingly, I respectfully dissent from Parts IV and V of the Court's opinion, and from its judgment.

JUSTICE GINSBURG, concurring in part and dissenting in part.

I join Parts I, II, and III of the Court's opinion, and dissent from Parts IV and V.

This case is unlike the Court's recent forays into the domain of state tort law under the banner of substantive due process. See *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 418–428 (2003) (reining in state-court awards of punitive damages); *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 574–585 (1996) (same). The controversy here presented "arises under federal maritime jurisdiction," *ante*, at 501 (opinion of the Court), and, beyond question, "the Court possesses the power to craft the rule it announces today," *ante*, at 522 (STEVENS, J., concurring in part and dissenting in part). The issue, therefore, is whether the Court, though competent to act, should nevertheless leave the matter to Congress. The Court has explained, in its well stated and comprehensive opinion, why it has taken the lead. While recognizing that the question is close, I share JUSTICE STEVENS' view that Congress is the better equipped decisionmaker.

First, I question whether there is an urgent need in maritime law to break away from the "traditional common-law approach" under which punitive damages are determined by a properly instructed jury, followed by trial-court, and then appellate-court review, "to ensure that [the award] is reasonable." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 15 (1991). The Court acknowledges that the traditional approach "has not mass-produced runaway awards," *ante*, at 497, or endangered settlement negotiations, *ante*, at 498–499, n. 15. Nor has the Court asserted that outlier awards, insufficiently checked by abuse-of-discretion review, occur more

often or are more problematic in maritime cases than in other areas governed by federal law.

Second, assuming a problem in need of solution, the Court's lawmaking prompts many questions. The 1:1 ratio is good for this case, the Court believes, because Exxon's conduct ranked on the low end of the blameworthiness scale: Exxon was not seeking "to augment profit," nor did it act "with a purpose to injure," *ante*, at 494. What ratio will the Court set for defendants who acted maliciously or in pursuit of financial gain? See *ante*, at 510–511. Should the magnitude of the risk increase the ratio and, if so, by how much? Horrendous as the spill from the *Valdez* was, millions of gallons more might have spilled as a result of Captain Hazelwood's attempt to rock the boat off the reef. See *ante*, at 478 (opinion of the Court); cf. *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 460–462 (1993) (plurality opinion) (using potential loss to plaintiff as a guide in determining whether jury verdict was excessive). In the end, is the Court holding only that 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed "the constitutional outer limit"? See *ante*, at 515, n. 28. On next opportunity, will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the States, and for all federal claims?

Heightening my reservations about the 1:1 solution is JUSTICE STEVENS' comment on the venturesome character of the Court's decision. In the States, he observes, fixed ratios and caps have been adopted by legislatures; this Court has not identified "[any] state *court* that has imposed a precise ratio" in lieu of looking to the legislature as the appropriate source of a numerical damages limitation. *Ante*, at 520.

* * *

For the reasons stated, I agree with JUSTICE STEVENS that the new law made by the Court should have been left

to Congress. I would therefore affirm the judgment of the Court of Appeals.

JUSTICE BREYER, concurring in part and dissenting in part.

I join Parts I, II, and III of the Court's opinion. But I disagree with its conclusion in Parts IV and V that the punitive damages award in this case must be reduced.

Like the Court, I believe there is a need, grounded in the rule of law itself, to ensure that punitive damages are awarded according to meaningful standards that will provide notice of how harshly certain acts will be punished and that will help to ensure the uniform treatment of similarly situated persons. See *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 587 (1996) (BREYER, J., concurring). Legal standards, however, can secure these objectives without the rigidity that an absolute fixed numerical ratio demands. In setting forth constitutional due process limits on the size of punitive damages awards, for example, we said that "*few* awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 425 (2003) (emphasis added). We thus foresaw exceptions to the numerical constraint.

In my view, a limited exception to the Court's 1:1 ratio is warranted here. As the facts set forth in Part I of the Court's opinion make clear, this was no mine-run case of reckless behavior. The jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs in this case. Given that conduct, it was only a matter of time before a crash and spill like this occurred. And as JUSTICE GINSBURG points out, the damage easily could have been much worse. See *ante*, at 524 (opinion concurring in part and dissenting in part).

The jury thought that the facts here justified punitive damages of $5 billion. See *ante*, at 480–481 (opinion of the Court). The District Court agreed. It "engaged in an exacting review" of that award "not once or twice, but three times, with a more penetrating inquiry each time," the case having twice been remanded for reconsideration in light of Supreme Court due process cases that the District Court had not previously had a chance to consider. 296 F. Supp. 2d 1071, 1110 (D. Alaska 2004). And each time it concluded "that a $5 billion award was justified by the facts of this case," based in large part on the fact that "Exxon's conduct was highly reprehensible," and it reduced the award (slightly) only when the Court of Appeals specifically demanded that it do so. *Ibid.*; see also *id.*, at 1075.

When the Court of Appeals finally took matters into its own hands, it concluded that the facts justified an award of $2.5 billion. See 472 F. 3d 600, 625 (CA9 2006) *(per curiam)*. It specifically noted the "egregious" nature of Exxon's conduct. *Ibid.* And, apparently for that reason, it believed that the facts of the case "justifie[d] a considerably higher ratio" than the 1:1 ratio we had applied in our most recent due process case and that the Court adopts here. *Ibid.*

I can find no reasoned basis to disagree with the Court of Appeals' conclusion that this is a special case, justifying an exception from strict application of the majority's numerical rule. The punitive damages award before us already represents a 50% reduction from the amount that the District Court strongly believed was appropriate. I would uphold it.

Syllabus

MORGAN STANLEY CAPITAL GROUP INC. *v.* PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–1457. Argued February 19, 2008—Decided June 26, 2008*

Under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission (FERC) must presume that the electricity rate set in a freely negotiated wholesale-energy contract meets the "just and reasonable" requirement of the Federal Power Act (FPA), see 16 U. S. C. §824d(a), and the presumption may be overcome only if FERC concludes that the contract seriously harms the public interest. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332; *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348. Under FERC's current regulatory regime, a wholesale-electricity seller may file a "market-based" tariff, which simply states that the utility will enter into freely negotiated contracts with purchasers. Those contracts are not filed with FERC before they go into effect. In 2000 and 2001, there was a dramatic increase in the price of electricity in the western United States. As a result, respondents entered into long-term contracts with petitioners that locked in rates that were very high by historical standards. Respondents subsequently asked FERC to modify the contracts, contending that the rates should not be presumed just and reasonable under *Mobile-Sierra*. The Administrative Law Judge concluded that the presumption applied and that the contracts did not seriously harm the public interest. FERC affirmed, but the Ninth Circuit remanded. The court held that contract rates are presumptively reasonable only where FERC has had an initial opportunity to review the contracts without applying the *Mobile-Sierra* presumption and therefore that the presumption should not apply to contracts entered into under "market-based" tariffs. The court alternatively held that there is a different standard for overcoming the *Mobile-Sierra* presumption when a *purchaser* challenges a contract: whether the contract exceeds a "zone of reasonableness."

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*Together with No. 06–1462, *American Electric Power Service Corp. et al.* v. *Public Utility District No. 1 of Snohomish County et al.*, also on certiorari to the same court.

Syllabus

Held:

1. FERC was required to apply the *Mobile-Sierra* presumption in evaluating the contracts here. *Sierra* held that a rate set out in a contract must be presumed to be just and reasonable absent serious harm to the public interest, regardless of when the contract is challenged. *FPC* v. *Texaco Inc.*, 417 U. S. 380, distinguished. Also, the Ninth Circuit's rule requiring FERC to ask whether a contract was formed in an environment of market "dysfunction" is not supported by this Court's cases and plainly undermines the role of contracts in the FPA's statutory scheme. Pp. 544–548.

2. The Ninth Circuit's "zone of reasonableness" test fails to accord an adequate level of protection to contracts. The standard for a buyer's rate-increase challenge must be the same, generally, as the standard for a seller's challenge: The contract rate must seriously harm the public interest. The Ninth Circuit misread *Sierra* in holding that the standard for evaluating a high-rate challenge and setting aside a contract rate is whether consumers' electricity bills were higher than they would have been had the contract rates equaled "marginal cost." Under the *Mobile-Sierra* presumption, setting aside a contract rate requires a finding of "unequivocal public necessity," *Permian Basin Area Rate Cases*, 390 U. S. 747, 822, or "extraordinary circumstances," *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S. 571, 582. Pp. 548–551.

3. The judgment below is nonetheless affirmed on alternative grounds, based on two defects in FERC's analysis. First, the analysis was flawed or incomplete to the extent FERC looked simply to whether consumers' rates increased immediately upon conclusion of the relevant contracts, rather than determining whether the contracts imposed an excessive burden "down the line," relative to the rates consumers could have obtained (but for the contracts) after elimination of the dysfunctional market. *Sierra*'s "excessive burden" on customers was the current burden, not just the burden imposed at the contract's outset. See 350 U. S., at 355. Second, it is unclear from FERC's orders whether it found respondents' evidence inadequate to support their claim that petitioners engaged in unlawful market manipulation that altered the playing field for contract negotiations. In such a case, FERC should not presume that a contract is just and reasonable. Like fraud and duress, unlawful market activity directly affecting contract negotiations eliminates the premise on which the *Mobile-Sierra* presumption rests: that the contract rates are the product of fair, arms-length negotiations. On remand, FERC should amplify or clarify its findings on these two points. Pp. 552–555.

471 F. 3d 1053, affirmed and remanded.

Syllabus

SCALIA, J., delivered the opinion of the Court, in which KENNEDY, THOMAS, and ALITO, JJ., joined, and in which GINSBURG, J., joined as to Part III. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 555. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 555. ROBERTS, C. J., and BREYER, J., took no part in the consideration or decision of the cases.

Walter Dellinger argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 06–1457 were *Sri Srinivasan*, *Mark S. Davies*, *Zachary D. Stern*, *Paul J. Pantano, Jr.*, and *Michael A. Yuffee*. *Donald B. Ayer*, *Lawrence D. Rosenberg*, *Shay Dvoretzky*, *Juliet J. Karastelev*, *Robert F. Shapiro*, *Keith R. McCrea*, *Kent L. Jones*, *William H. Penniman*, *Michael J. Gergen*, and *Jared W. Johnson* filed briefs for petitioners in No. 06–1462.

Deputy Solicitor General Kneedler argued the cause for respondent FERC in support of petitioners in both cases pursuant to this Court's Rule 12.6. With him on the brief were former *Solicitor General Clement*, *Eric D. Miller*, *Cynthia A. Marlette*, *Robert H. Solomon*, and *Lona T. Perry*.

Christopher J. Wright argued the cause for nonfederal respondents in both cases. With him on the brief for respondents Public Utility District No. 1 of Snohomish County et al. were *Richard G. Taranto*, *Paul J. Kaleta*, *Eric Christensen*, *John E. McCaffrey*, *David D'Alessandro*, and *Kelly A. Daly*. *Randolph Lee Elliott* and *Milton J. Grossman* filed a brief in both cases for respondent Golden State Water Company. *William J. Kayatta, Jr.*, *Jared S. des Rosiers*, *Catherine R. Connors*, *Randolph L. Wu*, *Mary F. McKenzie*, *Harvey Y. Morris*, and *Elizabeth M. McQuillan* filed a brief in both cases for respondents Public Utilities Commission of the State of California et al.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for Coral Power, L. L. C., et al. by *Richard P. Bress*, *Stephanie S. Lim*, *Barry J. Blonien*, *Jeffrey D. Watkiss*, *James N. Westwood*, and *Joseph M. Paul*; for the Electric Power Supply Association et al. by *Kenneth W. Starr*, *Neil*

JUSTICE SCALIA delivered the opinion of the Court.

Under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a freely negotiated wholesale-energy contract meets the "just and reasonable" requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest. These cases present two questions

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L. Levy, Robert R. Gasaway, Ashley C. Parrish, David G. Tewksbury, Scott M. Abeles, David B. Johnson, Barry Russell, Timm Abendroth, Henry S. May, Jr., Catherine O'Harra, Peter W. Brown, and *Daniel W. Douglass;* for the International Swaps and Derivatives Association, Inc., et al. by *Roy T. Englert, Jr., Gary A. Orseck,* and *Donald J. Russell;* for Powerex Corp. et al. by *David C. Frederick, Scott H. Angstreich, Paul W. Fox, Deanna E. King, Gary D. Bachman, Howard E. Shapiro, Brett A. Snyder, Jesse A. Dillon, Donald A. Kaplan, John Longstreth,* and *Alan Z. Yudkowsky;* and for William J. Baumol et al. by *John N. Estes III* and *Jeffrey A. Lamken.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Illinois et al. by *Lisa Madigan,* Attorney General of Illinois, *Michael A. Scodro,* Solicitor General, *Jane Elinor Notz,* Deputy Solicitor General, and *Susan Hedman,* Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Thomas J. Miller* of Iowa, *Martha Coakley* of Massachusetts, *Lori Swanson* of Minnesota, *Mike McGrath* of Montana, *Kelly A. Ayotte* of New Hampshire, *W. A. Drew Edmondson* of Oklahoma, and *Patrick C. Lynch* of Rhode Island; for AARP by *Barbara Jones, Stacy Canan, Michael Schuster,* and *William Julian II;* for the American Public Power Association et al. by *Scott H. Strauss, Susan N. Kelly, Wallace F. Tillman,* and *Richard Meyer;* for the Colorado Office of Consumer Counsel et al. by *Lynn Hargis* and *Scott L. Nelson;* for the Large Public Power Council by *Jonathan D. Schneider* and *Harvey L. Reiter;* for the National Association of Regulatory Utility Commissioners et al. by *James Bradford Ramsay;* and for the Public Utility Law Project of New York, Inc., by *Gerald A. Norlander.*

A brief of *amicus curiae* was filed in both cases for the State of Washington by *Robert M. McKenna,* Attorney General, *Jeffrey D. Goltz,* Deputy Attorney General, *Donald T. Trotter* and *Robert D. Cedarbaum,* Senior Counsel, *Tina E. Kondo,* Senior Assistant Attorney General, and *Brady R. Johnson,* Assistant Attorney General.

about the scope of the *Mobile-Sierra* doctrine: First, does the presumption apply only when FERC has had an initial opportunity to review a contract rate without the presumption? Second, does the presumption impose as high a bar to challenges by purchasers of wholesale electricity as it does to challenges by sellers?

I

A

Statutory Background

The Federal Power Act (FPA), 41 Stat. 1063, as amended, gives the Commission[1] the authority to regulate the sale of electricity in interstate commerce—a market historically characterized by natural monopoly and therefore subject to abuses of market power. See 16 U. S. C. §824 *et seq.* (2000 ed. and Supp. V). Modeled on the Interstate Commerce Act, the FPA requires regulated utilities to file compilations of their rate schedules, or "tariffs," with the Commission, and to provide service to electricity purchasers on the terms and prices there set forth. §824d(c). Utilities wishing to change their tariffs must notify the Commission 60 days before the change is to go into effect. §824d(d). Unlike the Interstate Commerce Act, however, the FPA also permits utilities to set rates with individual electricity purchasers through bilateral contracts. §824d(c), (d). As we have explained elsewhere, the FPA "departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 479 (2002). Like tariffs, contracts must be filed with the Commission before they go into effect. 16 U. S. C. §824d(c), (d).

The FPA requires all wholesale-electricity rates to be "just and reasonable." §824d(a). When a utility files a new

[1] We also use "Commission" to refer to the Federal Power Commission, FERC's predecessor.

rate with the Commission, through a change to its tariff or a new contract, the Commission may suspend the rate for up to five months while it investigates whether the rate is just and reasonable. § 824d(e). The Commission may, however, decline to investigate and permit the rate to go into effect—which does not amount to a determination that the rate is "just and reasonable." See 18 CFR § 35.4 (2007). After a rate goes into effect, whether or not the Commission deemed it just and reasonable when filed, the Commission may conclude, in response to a complaint or on its own motion, that the rate is not just and reasonable and replace it with a lawful rate. 16 U. S. C. § 824e(a) (2000 ed., Supp. V).

The statutory requirement that rates be "just and reasonable" is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions. See *FPC* v. *Texaco Inc.*, 417 U. S. 380, 389 (1974); *Permian Basin Area Rate Cases*, 390 U. S. 747, 767 (1968). We have repeatedly emphasized that the Commission is not bound to any one ratemaking formula. See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 498 U. S. 211, 224 (1991); *Permian Basin*, *supra*, at 776–777. But FERC must choose a method that entails an appropriate "balancing of the investor and the consumer interests." *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603 (1944). In exercising its broad discretion, the Commission traditionally reviewed and set tariff rates under the "cost-of-service" method, which ensures that a seller of electricity recovers its costs plus a rate of return sufficient to attract necessary capital. See J. McGrew, Federal Energy Regulatory Commission 152, 160–161 (2003) (hereinafter McGrew).

In two cases decided on the same day in 1956, we addressed the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, we rejected a natural-gas utility's argument that

the Natural Gas Act's requirement that it file all new rates with the Commission authorized it to abrogate a lawful contract with a purchaser simply by filing a new tariff, see *id.*, at 336–337. The filing requirement, we explained, is merely a *precondition* to changing a rate, not an *authorization* to change rates in violation of a lawful contract (*i. e.*, a contract that sets a just and reasonable rate). See *id.*, at 339–344.

In *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 352–353 (1956), we applied the holding of *Mobile* to the analogous provisions of the FPA, concluding that the complaining utility could not supersede a contract rate simply by filing a new tariff. In *Sierra*, however, the Commission had concluded not only (contrary to our holding) that the newly filed tariff superseded the contract, but also that the contract rate itself was not just and reasonable, "solely because it yield[ed] less than a fair return on the net invested capital" of the utility. 350 U. S., at 355. Thus, we were confronted with the question of how the Commission may evaluate whether a contract rate is just and reasonable.

We answered that question in the following way:

> "[T]he Commission's conclusion appears on its face to be based on an erroneous standard. . . . [W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. . . . In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Id.*, at 354–355 (emphasis deleted).

As we said in a later case, "[t]he regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." *Permian Basin*, *supra*, at 822.

Over the past 50 years, decisions of this Court and the Courts of Appeals have refined the *Mobile-Sierra* presumption to allow greater freedom of contract. In *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103, 110–113 (1958), we held that parties could contract out of the *Mobile-Sierra* presumption by specifying in their contracts that a new rate filed with the Commission would supersede the contract rate. Courts of Appeals have held that contracting parties may also agree to a middle option between *Mobile-Sierra* and *Memphis Light:* A contract that does not allow the seller to supersede the contract rate by filing a new rate may nonetheless permit the Commission to set aside the contract rate if it results in an unfair rate of return, not just if it violates the public interest. See, *e. g.*, *Papago Tribal Util. Auth.* v. *FERC*, 723 F. 2d 950, 953 (CADC 1983); *Louisiana Power & Light Co.* v. *FERC*, 587 F. 2d 671, 675–676 (CA5 1979). Thus, as the *Mobile-Sierra* doctrine has developed, regulated parties have retained broad authority to specify whether FERC can review a contract rate solely for whether it violates the public interest or also for whether it results in an unfair rate of return. But the *Mobile-Sierra* presumption remains the default rule.

Moreover, even though the challenges in *Mobile* and *Sierra* were brought by sellers, lower courts have concluded that the *Mobile-Sierra* presumption also applies where a purchaser, rather than a seller, asks FERC to modify a contract. See *Potomac Elec. Power Co.* v. *FERC*, 210 F. 3d 403, 404–405, 409–410 (CADC 2000); *Boston Edison Co.* v. *FERC*, 856 F. 2d 361, 372 (CA1 1988). This Court has seemingly blessed that conclusion, explaining that under the FPA, "[w]hen commercial parties . . . avail themselves of rate

agreements, the principal regulatory responsibility [is] not to relieve a contracting party of an unreasonable rate." *Verizon*, 535 U. S., at 479 (citing *Sierra*, *supra*, at 355).

Over the years, the Commission began to refer to the two modes of review—one with the *Mobile-Sierra* presumption and the other without—as the "public interest standard" and the "just and reasonable standard." See, *e. g.*, *In re Southern Company Servs., Inc.*, 39 FERC ¶63,026, pp. 65,134, 65,141 (1987). Decisions from the Courts of Appeals did likewise. See, *e. g.*, *Kansas Cities* v. *FERC*, 723 F. 2d 82, 87–88 (CADC 1983); *Northeast Utils. Serv. Co.* v. *FERC*, 993 F. 2d 937, 961 (CA1 1993). We do not take this nomenclature to stand for the obviously indefensible proposition that a standard different from the statutory just-and-reasonable standard applies to contract rates. Rather, the term "public interest standard" refers to the differing *application* of that just-and-reasonable standard to contract rates. See *Philadelphia Elec. Co.*, 58 F. P. C. 88, 90 (1977). (It would be less confusing to adopt the Solicitor General's terminology, referring to the two differing applications of the just-and-reasonable standard as the "ordinary" "just and reasonable standard" and the "public interest standard." See Reply Brief for Respondent FERC 6.)

B

Recent FERC Innovations; Market-Based Tariffs

In recent decades, the Commission has undertaken an ambitious program of market-based reforms. Part of the impetus for those changes was technological evolution. Historically, electric utilities had been vertically integrated monopolies. For a particular geographic area, a single utility would control the generation of electricity, its transmission, and its distribution to consumers. See *Midwest ISO Transmission Owners* v. *FERC*, 373 F. 3d 1361, 1363 (CADC 2004). Since the 1970's, however, engineering innovations have lowered the cost of generating electricity and transmit-

ting it over long distances, enabling new entrants to challenge the regional generating monopolies of traditional utilities. See generally *New York* v. *FERC*, 535 U. S. 1, 7–8 (2002); *Public Util. Dist. No. 1 of Snohomish Cty.* v. *FERC*, 272 F. 3d 607, 610 (CADC 2001) *(per curiam)*.

To take advantage of these changes, the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity. It has sought to promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power, while ensuring that the segment of the industry characterized by natural monopoly—namely, the transmission grid that conveys the generated electricity—cannot exert monopolistic influence over other areas. See *New York*, *supra*, at 9–10; *Snohomish*, *supra*. To that end, FERC required in Order No. 888 that each transmission provider offer transmission service to all customers on an equal basis by filing an "open access transmission tariff." Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21540 (1996); see *New York*, *supra*, at 10–12. That requirement prevents the utilities that own the grid from offering more favorable transmission terms to their own affiliates and thereby extending their monopoly power to other areas of the industry.

To further pry open the wholesale-electricity market and to reduce technical inefficiencies caused when different utilities operate different portions of the grid independently, the Commission has encouraged transmission providers to establish "Regional Transmission Organizations"—entities to which transmission providers would transfer operational control of their facilities for the purpose of efficient coordination. Order No. 2000, 65 Fed. Reg. 810, 811–812 (2000); see *Midwest ISO*, *supra*, at 1364. It has encouraged the management of those entities by "Independent System Operators," not-for-profit entities that operate transmission facili-

ties in a nondiscriminatory manner. See *Midwest ISO*, *supra*. In addition to coordinating transmission service, Regional Transmission Organizations perform other functions, such as running auction markets for electricity sales and offering contracts for hedging against potential grid congestion. See Blumsack, Measuring the Benefits and Costs of Regional Electric Grid Integration, 28 Energy L. J. 147 (2007).

Against this backdrop of technological change and market-based reforms, the Commission over the past two decades has begun to permit sellers of wholesale electricity to file "market-based" tariffs. These tariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers. See generally Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39904 (2007) (hereinafter Market-Based Rates); McGrew 160–167. FERC does not subject the contracts entered into under these tariffs (as it subjected traditional wholesale-power contracts) to § 824d's requirement of immediate filing, apparently on the theory that the requirement has been satisfied by the initial filing of the market-based tariffs themselves. See Brief for Respondent FERC 28–29 (hereinafter Brief for FERC).

FERC will grant approval of a market-based tariff only if a utility demonstrates that it lacks or has adequately mitigated market power, lacks the capacity to erect other barriers to entry, and has avoided giving preferences to its affiliates. See Market-Based Rates ¶ 7, 72 Fed. Reg. 39907. In addition to the initial authorization of a market-based tariff, FERC imposes ongoing reporting requirements. A seller must file quarterly reports summarizing the contracts that it has entered into, even extremely short-term contracts. See *California ex rel. Lockyer* v. *FERC*, 383 F. 3d 1006, 1013 (CA9 2004). It must also demonstrate every four months

that it still lacks or has adequately mitigated market power. See *ibid.* If FERC determines from these filings that a seller has reattained market power, it may revoke the authority prospectively. See Market-Based Rates ¶ 5, 72 Fed. Reg. 39906. And if the Commission finds that a seller has violated its Regional Transmission Organization's market rules, its tariff, or Commission orders, the Commission may take appropriate remedial action, such as ordering refunds, requiring disgorgement of profits, and imposing civil penalties. See *ibid.*

Both the Ninth Circuit and the D. C. Circuit have generally approved FERC's scheme of market-based tariffs. See *Lockyer*, *supra*, at 1011–1013; *Louisiana Energy & Power Auth.* v. *FERC*, 141 F. 3d 364, 365 (CADC 1998). We have not hitherto approved, and express no opinion today, on the lawfulness of the market-based-tariff system, which is not one of the issues before us. It suffices for the present cases to recognize that when a seller files a market-based tariff, purchasers no longer have the option of buying electricity at a rate set by tariff and contracts no longer need to be filed with FERC (and subjected to its investigatory power) before going into effect.

C

California's Electricity Regulation and Its Consequences

In 1996, California enacted Assembly Bill 1890 (AB 1890), which massively restructured the California electricity market. See 1996 Cal. Stat. ch. 854 (codified at Cal. Pub. Util. Code Ann. §§330–398.5 (West 2004 and Supp. 2008)); see generally Cudahy, Whither Deregulation: A Look at the Portents, 58 N. Y. U. Annual Survey of Am. Law 155, 172–185 (2001) (hereinafter Cudahy). The bill transferred operational control of the transmission facilities of California's three largest investor-owned utilities to an Independent Service Operator (Cal-ISO). See *Pacific Gas & Elec. Co.* v.

FERC, 464 F. 3d 861, 864 (CA9 2006). It also established the California Power Exchange (CalPX), a nonprofit entity that operated a short-term market—or "spot market"—for electricity. The bill required California's three largest investor-owned utilities to divest most of their electricity-generation facilities. It then required those utilities to purchase and sell the bulk of their electricity from and to the CalPX's spot market, permitting only limited leeway for them to enter into long-term contracts. See *Public Util. Dist. No. 1 of Snohomish Cty.* v. *FERC*, 471 F. 3d 1053, 1068 (CA9 2006) (case below).

In 1997, FERC approved the Cal-ISO as consistent with the requirements for an Independent Service Operator established in Order No. 888. FERC also approved the CalPX and the investor-owned utilities' authority to make sales at market-based rates in the CalPX, finding that, in light of the divesture of their generation units and other conditions imposed under the restructuring plan, those utilities had adequately mitigated their market power. See *Pacific Gas & Elec. Co.*, 81 FERC ¶61,122, pp. 61,435, 61,435–61,436, 61,537–61,548 (1997).

The CalPX opened for business in March 1998. In the summer of 1999, it expanded to include an auction for sales of electricity under "forward contracts"—contracts in which sellers promise to deliver electricity more than one day in the future (sometimes many years). But the participation of California's large investor-owned utilities in that forward market was limited because, as we have said, AB 1890 strictly capped the amount of power that they could purchase outside of the spot market. See 471 F. 3d, at 1068.

That diminishment of the role of long-term contracts in the California electricity market turned out to be one of the seeds of an energy crisis. In the summer of 2000, the price of electricity in the CalPX's spot market jumped dramatically—more than fifteenfold. See *ibid.* The increase was the result of a combination of natural, economic, and regula-

tory factors: "flawed market rules; inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in electricity demand; unusually high temperatures; an increase in unplanned outages of extremely old generating facilities; and market manipulation." *CAlifornians for Renewable Energy, Inc.* v. *Sellers of Energy and Ancillary Servs.*, 119 FERC ¶61,058, pp. 61,243, 61,247 (2007). Because California's investor-owned utilities had for the most part been forbidden to obtain their power through long-term contracts, the turmoil in the spot market hit them hard. See Cudahy 174. The high prices led to rolling blackouts and saddled utilities with mounting debt.

In late 2000, the Commission took action. A central plank of its emergency effort was to eliminate the utilities' reliance on the CalPX's spot market and to shift their purchases to the forward market. To that end, FERC abolished the requirement that investor-owned utilities purchase and sell all power through the CalPX and encouraged them to enter into long-term contracts. See *San Diego Gas & Electric Co.* v. *Sellers of Energy and Ancillary Servs.*, 93 FERC ¶61,294, pp. 61,980, 61,982 (2000); see also 471 F. 3d, at 1069. The Commission also put price caps on wholesale electricity. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy and Ancillary Servs.*, 95 FERC ¶61,418, p. 62,545 (2001). By June 2001, electricity prices began to decline to normal levels. *Id.*, at 62,546.

D

Genesis of These Cases

The principal respondents in these cases are western utilities that purchased power under long-term contracts during that tumultuous period in 2000 and 2001. Although they are not located in California, the high prices in California spilled

over into other Western States. See 471 F. 3d, at 1069. Petitioners are the sellers that entered into the contracts with respondents.

The contracts between the parties included rates that were very high by historical standards. For example, respondent Snohomish signed a 9-year contract to purchase electricity from petitioner Morgan Stanley at a rate of $105/megawatt hour (MWh), whereas prices in the Pacific Northwest have historically averaged $24/MWh. The contract prices were substantially lower, however, than the prices that Snohomish would have paid in the spot market during the energy crisis, when prices peaked at $3,300/MWh. See *id.*, at 1069–1070.

After the crisis had passed, buyer's remorse set in and respondents asked FERC to modify the contracts. They contended that the rates in the contracts should not be presumed to be just and reasonable under *Mobile-Sierra* because, given the sellers' market-based tariffs, the contracts had never been initially approved by the Commission without the presumption. See *Nevada Power Co.* v. *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,353, pp. 62,382, 62,387 (2003). Respondents also argued that contract modification was warranted even under the *Mobile-Sierra* presumption because the contract rates were so high that they violated the public interest. See 103 FERC, at 62,383, 62,387–62,395.

In a preliminary order, the Commission instructed the Administrative Law Judge (ALJ) to consider 12 different factors in deciding whether the presumption could be overcome for the contracts, such as the terms of the contracts, the available alternatives at the time of sale, the relationship of the rates to Commission benchmarks, the effect of the contracts on the financial health of the purchasers, and the impact of contract modification on national energy markets. After a hearing, the ALJ concluded that the *Mobile-Sierra* presumption should apply to the contracts and that the con-

tracts did not seriously harm the public interest. In fact, according to the ALJ, even if the *Mobile-Sierra* presumption did not apply, respondents would not be entitled to have the contracts modified. 103 FERC, at 62,390–62,394.

Between the ALJ's decision and the Commission's ruling, the Commission's staff issued a report (Staff Report) concluding that unlawful activities of various sellers in the spot market had affected prices in the forward market. See *id.*, at 62,396. Respondents raised the report at oral argument before the Commission, and some of them argued that petitioners "were unlawfully manipulating market prices, thereby engaging in fraud and deception in violation of their market-based rate tariffs." *Ibid.* Petitioners contended, however, that the Staff Report demonstrated only a correlation between rates in the spot and forward markets, not a causal connection. See *ibid.*

FERC affirmed the ALJ. The Commission first held that the *Mobile-Sierra* presumption did apply to the contracts at issue. Although agreeing with respondents that the presumption applies only where FERC has had an initial opportunity to review a contract rate, the Commission relied on the somewhat metaphysical ground that the grant of market-based authority to petitioners qualified as that initial opportunity. See 103 FERC, at 62,388–62,389. The Commission then held that respondents could not overcome the *Mobile-Sierra* presumption. It recognized that the Staff Report had "found that spot market distortions flowed through to forward power prices," 103 FERC, at 62,396–62,397, but concluded that this finding, even if true, was not "determinative" because:

> "a finding that the unjust and unreasonable spot market caused forward bilateral prices to be unjust and unreasonable would be relevant to contract modification only where there is a 'just and reasonable' standard of review. . . . Under the 'public interest' standard, to jus-

> tify contract modification it is not enough to show that forward prices became unjust and unreasonable due to the impact of spot market dysfunctions; it must be shown that the rates, terms and conditions are contrary to the public interest." *Id.*, at 62,397.

The Commission determined that under the factors identified in *Sierra*, as well as under a totality-of-the-circumstances test, respondents had not demonstrated that the contracts threatened the public interest. See 103 FERC, at 62,397–62,399. On rehearing, respondents reiterated their complaints, including their charge that "their contracts were the product of market manipulation by Enron, Morgan Stanley and other [sellers]." 105 FERC ¶61,185, pp. 61,979, 61,989 (2003). The Commission answered that there was "no evidence to support a finding of market manipulation that specifically affected the contracts at issue." *Id.*, at 61,989.

Respondents filed petitions for review in the Ninth Circuit, which granted the petitions and remanded to the Commission, finding two flaws in the Commission's analysis.[2] First, the court agreed with respondents that rates set by contract (whether pursuant to a market-based tariff or not) are presumptively reasonable only where FERC has had an initial opportunity to review the contracts without applying the *Mobile-Sierra* presumption. To satisfy that prerequisite under the market-based tariff regime, the court said, the Commission must promptly review the terms of contracts after their formation and must modify those that do not appear to be just and reasonable when evaluated without the *Mobile-Sierra* presumption (rather than merely revok-

[2] In a holding not challenged before this Court, the Ninth Circuit concluded that the contracts at issue did not contain "*Memphis* clause[s]," 471 F. 3d 1053, 1079 (2006) (citing *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103 (1958)), see *supra*, at 534, that would have precluded application of the *Mobile-Sierra* presumption.

ing market-based authority prospectively but leaving preexisting contracts intact). See 471 F. 3d, at 1075–1077, 1079–1085. This initial review must include an inquiry into "the market conditions in which the contracts at issue were formed," and market "dysfunction" is a ground for finding a contract not to be just and reasonable. *Id.*, at 1085–1087. Second, the Ninth Circuit held that even assuming that the *Mobile-Sierra* presumption applied, the standard for overcoming that presumption is different for a *purchaser's* challenge to a contract, namely, whether the contract rate exceeds a "zone of reasonableness." 471 F. 3d, at 1088–1090.

We granted certiorari. See 551 U. S. 1189 (2007).

II

A

Application of *Mobile-Sierra* Presumption to Contracts Concluded Under Market-Based Rate Authority

As noted earlier, the FERC order under review here agreed with the Ninth Circuit's premise that the Commission must have an initial opportunity to review a contract without the *Mobile-Sierra* presumption, but maintained that the authorization for market-based rate authority qualified as that initial review. Before this Court, however, FERC changes its tune, arguing that there is no such prerequisite—or at least that FERC could reasonably conclude so and therefore that *Chevron* deference is in order. See Brief for FERC 20–21, 33–34; *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). We will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94–95 (1943). But FERC has lucked out: The *Chenery* doctrine has no application to these cases, because we conclude that the Commission was *required*, under our decision in *Sierra*,

to apply the *Mobile-Sierra* presumption in its evaluation of the contracts here. That it provided a different rationale for the necessary result is no cause for upsetting its ruling. "To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 766–767, n. 6 (1969) (plurality opinion).

We are in broad agreement with the Ninth Circuit on a central premise: There is only one statutory standard for assessing wholesale-electricity rates, whether set by contract or tariff—the just-and-reasonable standard. The plain text of the FPA states that "[a]ll rates . . . shall be just and reasonable." 16 U. S. C. §824d(a); see also §824e(a) (2000 ed., Supp. V). But we disagree with the Ninth Circuit's interpretation of *Sierra* as requiring (contrary to the statute) that the Commission apply the standard differently, depending on *when* a contract rate is challenged. In the Ninth Circuit's view, *Sierra* was premised on the idea that "as long as the rate was just and reasonable when the contract was formed, there would be a presumption . . . that the reasonableness continued throughout the term of the contract." 471 F. 3d, at 1077. In other words, so long as the Commission concludes (either after a hearing or by allowing a rate to go into effect) that a contract rate is just and reasonable when initially filed, the rate will be presumed just and reasonable in future proceedings.

That is a misreading of *Sierra*. *Sierra* was grounded in the commonsense notion that "[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them." *Verizon*, 535 U. S., at 479. Therefore, only when the mutually agreed-upon contract rate seriously harms the consuming

public may the Commission declare it not to be just and reasonable.[3] *Sierra* thus provided a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context—a definition that applies regardless of when the contract is reviewed. The Ninth Circuit, by contrast, essentially read *Sierra* "as the equivalent of an estoppel doctrine," whereby an initial Commission opportunity for review prevents the Commission from modifying the rates absent serious future harm to the public interest. Tewksbury & Lim, Applying the *Mobile-Sierra* Doctrine to Market-Based Rate Contracts, 26 Energy L. J. 437, 457–458 (2005). But *Sierra* said nothing of the sort. And given that the Commission's passive permission for a rate to go into effect does not constitute a finding that the rate is just and reasonable, it would be odd to treat that initial "opportunity for review" as curtailing later challenges.

The Ninth Circuit found support for its prerequisite in our decision in *FPC* v. *Texaco Inc.*, 417 U. S. 380 (1974). In that case, we warned that the Commission's attempt to rely solely on market forces to evaluate rates charged by small natural-gas producers was inconsistent with the Natural Gas Act's insistence that rates be just and reasonable. See *id.*, at 397. The Ninth Circuit apparently took this to mean that all initially filed contracts must be subject to review without the *Mobile-Sierra* presumption. But *Texaco* had nothing to do with that doctrine. It held that the Commission had improperly implemented a scheme of *total deregulation* by applying no standard of review at all to small-producer rates. See 417 U. S., at 395–397. It did not cast doubt on the proposition that in a proper regulatory scheme, the ordinary mode for evaluating contractually set rates is to look to

[3] We do not say, as the dissent alleges, *post*, at 561 (opinion of STEVENS, J.), that the public interest is not also relevant in a challenge to unilaterally set rates. But it is the "'sole concern'" in a contract case. See *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 355 (1956).

whether the rates seriously harm the public interest, not to whether they are unfair to one of the parties that voluntarily assented to the contract. Cf. *id.*, at 391, n. 4.

Nor do we agree with the Ninth Circuit that FERC must inquire into whether a contract was formed in an environment of market "dysfunction" before applying the *Mobile-Sierra* presumption. Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce. That is why one of the Commission's responses to the energy crisis was to remove regulatory barriers to long-term contracts. It would be a perverse rule that rendered contracts less likely to be enforced when there is volatility in the market. (Such a rule would come into play, after all, *only* when a contract formed in a period of "dysfunction" did *not* significantly harm the consuming public, since contracts that seriously harm the public should be set aside even under the *Mobile-Sierra* presumption.) By enabling sophisticated parties who weathered market turmoil by entering long-term contracts to renounce those contracts once the storm has passed, the Ninth Circuit's holding would reduce the incentive to conclude such contracts in the future. Such a rule has no support in our case law and plainly undermines the role of contracts in the FPA's statutory scheme.

To be sure, FERC has ample authority to set aside a contract where there is unfair dealing at the contract formation stage—for instance, if it finds traditional grounds for the abrogation of the contract such as fraud or duress. See 103 FERC, at 62,399–62,400 ("[T]here is no evidence of unfairness, bad faith, or duress in the original negotiations"). In addition, if the "dysfunctional" market conditions under which the contract was formed were caused by illegal action of one of the parties, FERC should not apply the *Mobile-Sierra* presumption. See Part III, *infra*. But the mere

fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alternative to "purely tariff-based regulation." *Verizon*, 535 U. S., at 479. We may add that evaluating market "dysfunction" is a very difficult and highly speculative task—not one that the FPA would likely require the agency to engage in before holding sophisticated parties to their bargains.

We reiterate that we do not address the lawfulness of FERC's market-based-rates scheme, which assuredly has its critics. But any needed revision in that scheme is properly addressed in a challenge to the scheme itself, not through a disfigurement of the venerable *Mobile-Sierra* doctrine. We hold only that FERC may abrogate a valid contract only if it harms the public interest.

B

Application of "Excessive Burden" Exception to High-Rate Challenges

We turn now to the Ninth Circuit's second holding: that a "zone of reasonableness" test should be used to evaluate a buyer's challenge that a rate is too high. In our view that fails to accord an adequate level of protection to contracts. The standard for a buyer's challenge must be the same, generally speaking, as the standard for a seller's challenge: The contract rate must seriously harm the public interest. That is the standard that the Commission applied in the proceedings below.

We are again in agreement with the Ninth Circuit on a starting premise: It is clear that the three factors we identified in *Sierra*—"where [a rate] might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory," 350 U. S., at 355—are not all precisely applicable to the high-rate challenge of a purchaser (where, for example, the relevant question is not whether "other customers" [of

the utility] would be excessively burdened, but whether any customers of the purchaser would be); and that those three factors are in any event not the exclusive components of the public interest. In its decision below, the Commission recognized both these realities. See 103 FERC, at 62,397 ("Nevada Companies failed to show that the contract terms at issue impose an excessive burden *on their customers*" (emphasis added)); *id.*, at 62,398 ("The record also demonstrates that Snohomish presented no evidence that its contract with Morgan Stanley adversely affected Snohomish *or its ratepayers*" (emphasis added)); *id.*, at 62,398–62,399 (evaluating the "totality of circumstances"); see also Brief for FERC 41–42.[4]

Where we disagree with the Ninth Circuit is on the overarching "zone of reasonableness" standard it established for evaluating a high-rate challenge and setting aside a contract rate: whether consumers' electricity bills "are higher than they would otherwise have been had the challenged contracts called for rates within the just and reasonable range," *i. e.*, rates that equal "marginal cost."[5] 471 F. 3d, at 1089.

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[4]The dissent criticizes the Commission's decision because it took into account under the heading "totality of the circumstances" only the circumstances of the contract formation, not "circumstances exogenous to contract negotiations, including natural disasters and market manipulation by entities not parties to the challenged contract." *Post*, at 567. Those considerations are relevant to whether the contracts impose an "excessive burden" on consumers relative to what they would have paid absent the contracts. It is precisely our uncertainty whether the Commission considered those "circumstances exogenous to contract negotiations," discussed in Part III of our opinion, that causes us to approve the remand to FERC.

[5]Elsewhere the Ninth Circuit softened this standard somewhat, saying that "[e]ven if a particular rate exceeds marginal cost . . . it may still be within this reasonable range—or 'zone of reasonableness'—if that higher-than-cost-based price results from normal market forces and is part of a general trend toward rates that do reflect cost." 471 F. 3d, at 1089. We are not sure (and we think no one can be sure) precisely what this means. It has no basis in our opinions, and is in any event wrong because its point

The Ninth Circuit derived this test from our statement in *Sierra* that a contract rate would have to be modified if it were so low that it imposed an "excessive burden" on other wholesale purchasers. The Ninth Circuit took "excessive burden" to mean merely the burden caused when one set of consumers is forced to pay above marginal cost to compensate for below-marginal-cost rates charged other consumers. See 471 F. 3d, at 1088. And it proceeded to apply a similar notion of "excessive burden" to high-rate challenges (where all the burden of the above-marginal-cost contract rate falls on the purchaser's own customers, and does not affect the customers of third parties). *Id.*, at 1089. That is a misreading of *Sierra* and our later cases. A presumption of validity that disappears when the rate is above marginal cost is no presumption of validity at all, but a reinstitution of cost-based rather than contract-based regulation. We have said that, under the *Mobile-Sierra* presumption, setting aside a contract rate requires a finding of "unequivocal public necessity," *Permian Basin*, 390 U. S., at 822, or "extraordinary circumstances," *Arkansas Louisiana Gas Co.* v. *Hall*, 453

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of departure (the general principle that rates cannot exceed marginal cost) contradicts *Mobile-Sierra*.

The Ninth Circuit purported to find support for its "zone of reasonableness" test in the case law of the District of Columbia Circuit. But the cited case stands only for the proposition that a market-based scheme must ensure that market forces will, "over the long pull," cause rates to approximate marginal cost. *Interstate Natural Gas Assn. of Am.* v. *FERC*, 285 F. 3d 18, 31 (2002). Nowhere does the opinion suggest that the standard for reforming a particular contract validly entered into under a market-based scheme is whether the rates approximate marginal cost.

By the same token, our approval of FERC's decision not to set *prospective* area rates solely with reference to pre-existing contract prices, *Permian Basin Area Rate Cases*, 390 U. S. 747, 792–793 (1968), does not support, as the dissent thinks, *post*, at 562–563, n. 2, the view that the standard for abrogating an *existing*, valid contract is anything less than the *Mobile-Sierra* standard. *That* is the standard *Permian Basin* applied when actually confronted with the issue of contract modification. See 390 U. S., at 781–784, 821–822.

U. S. 571, 582 (1981). In no way can these descriptions be thought to refer to the mere exceeding of marginal cost.

The Ninth Circuit's standard would give short shrift to the important role of contracts in the FPA, as reflected in our decision in *Sierra*, and would threaten to inject more volatility into the electricity market by undermining a key source of stability. The FPA recognizes that contract stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards—which is why it permits rates to be set by contract and not just by tariff. As the Commission has recently put it, its "first and foremost duty is to protect consumers from unjust and unreasonable rates; however, . . . uncertainties regarding rate stability and contract sanctity can have a chilling effect on investments and a seller's willingness to enter into long-term contracts and this, in turn, can harm customers in the long run." Market-Based Rates ¶6, 72 Fed. Reg. 33906–33907.

Besides being wrong in principle, in its practical effect the Ninth Circuit's rule would impose an onerous new burden on the Commission, requiring it to calculate the marginal cost of the power sold under a market-based contract. Assuming that FERC even ventured to undertake such an analysis, rather than reverting to the *ancien régime* of cost-of-service ratesetting, the regulatory costs would be enormous. We think that the FPA intended to reserve the Commission's contract-abrogation power for those extraordinary circumstances where the public will be severely harmed.[6]

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[6]The dissent claims that we have misread the FPA because its provisions "do not distinguish between rates set unilaterally by tariff and rates set bilaterally by contract." *Post*, at 556. But the dissent's interpretation, whatever plausibility it has as an original matter, cannot be squared with *Sierra*, which plainly distinguished between unilaterally and bilaterally set rates, and said that the only relevant consideration for the Commission in the latter case is whether the public interest is harmed. And the circumstances identified in *Sierra* as implicating the public interest

III

Defects in FERC's Analysis Supporting Remand

Despite our significant disagreement with the Ninth Circuit, we find two errors in the Commission's analysis, and we therefore affirm the judgment below on alternative grounds.

First, it appears, as the Ninth Circuit concluded, see 471 F. 3d, at 1090, that the Commission may have looked simply to whether consumers' rates increased immediately upon the relevant contracts' going into effect, rather than determining whether the contracts imposed an excessive burden on consumers "down the line," relative to the rates they could have obtained (but for the contracts) after elimination of the dysfunctional market. For example, the Commission concluded that two of the respondents would experience "rate decreases of approximately 20 percent for retail service" during the period covered by the contracts. 103 FERC, at 62,397. But the baseline for that computation was the rate they were paying before the contracts went into effect. That disparity is certainly a relevant consideration; but so is

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refer to something more than a small dent in the consumer's pocket, which is why our subsequent cases have described the standard as a high one.

At the end of the day, the dissent simply argues against the settled understanding of the FPA that has prevailed in this Court, lower courts, and the Commission for half a century. Although the dissent is correct that we have never used the phrase "*Mobile-Sierra* doctrine" in our cases, that is probably because the understanding of it was so uniform that no circuit split concerning its meaning arose until the Ninth Circuit's erroneous decision in these cases. If one searches the Commission's reports, over 600 decisions since 2000 alone have cited the doctrine, see Brief for Electric Power Supply Association et al. as *Amici Curiae* 15, and the Courts of Appeals have used the term "*Mobile-Sierra* doctrine" (or "*Sierra-Mobile*" doctrine) over 75 times since 1974. If there were ever a context where long-settled understanding should be honored it is here, where a *statutory* decision (subject to revision by Congress) has been understood the same way for many years by lower courts, by this Court, by the federal agency the statute governs, and hence surely by the private actors trying to observe the law.

the disparity between the contract rate and the rates consumers would have paid (but for the contracts) further down the line, when the open market was no longer dysfunctional. That disparity, past a certain point, could amount to an "excessive burden." That is what was contemplated by *Sierra*, which involved a challenge 5 years into a 15-year contract. The "excessive burden" on other customers to which the opinion referred was assuredly the current burden, and not only the burden imposed at the very outset of the contract. See 350 U. S., at 355. The "unequivocal public necessity" that justifies overriding the *Mobile-Sierra* presumption does not disappear as a factor once the contract enters into force. Thus, FERC's analysis on this point was flawed—or at least incomplete. As the Ninth Circuit put it, "[i]t is entirely possible that rates had increased so high during the energy crises because of dysfunction in the spot market that, even with the acknowledged decrease in rates, consumers still paid more under the forward contracts than they otherwise would have." 471 F. 3d, at 1090. If that is so, and if that increase is so great that, even taking into account the desirability of fostering market-stabilizing long-term contracts, the rates impose an excessive burden on consumers or otherwise seriously harm the public interest, the rates must be disallowed.

Second, respondents alleged before FERC that some of the petitioners in these cases had engaged in market manipulation in the spot market. See, *e. g.*, 105 FERC, at 61,989 ("Snohomish and Nevada Companies argue that their contracts were the product of market manipulation by Enron, Morgan Stanley and other Respondents, which, as established by the Commission Staff, engaged in market manipulation"). The Staff Report concluded, as we have said, that the abnormally high prices in the spot market during the energy crisis influenced the terms of contracts in the forward market. But the Commission dismissed the relevance of the Staff Report on the ground that it had not demonstrated that forward market prices were so high as to overcome the

Mobile-Sierra presumption. We conclude, however, that if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable. Like fraud and duress, unlawful market activity that directly affects contract negotiations eliminates the premise on which the *Mobile-Sierra* presumption rests: that the contract rates are the product of fair, arms-length negotiations. The mere fact that the unlawful activity occurred in a different (but related) market does not automatically establish that it had no effect upon the contract—especially given the Staff Report's (unsurprising) finding that high prices in the one market produced high prices in the other. We are unable to determine from the Commission's orders whether it found the evidence inadequate to support the claim that respondents' alleged unlawful activities affected the contracts at issue here. It said in its order on rehearing, 105 FERC, at 61,989, that "[w]e . . . found no evidence to support a finding of market manipulation [by respondents] that specifically affected the contracts at issue." But perhaps that must be read in light of the Commission's above described rejection of the Staff Report on the ground that high spot-market prices caused by manipulation are irrelevant unless the forward market prices fail the *Mobile-Sierra* standard; and in light of the statement in its initial order, in apparent response to the claim of spot-market manipulation by respondents, 103 FERC, at 62,397, that "a finding that the unjust and unreasonable spot market prices caused forward bilateral prices to be unjust and unreasonable would be relevant to contract modification only where there is a 'just and reasonable' standard of review."

We emphasize that the mere fact of a party's engaging in unlawful activity in the spot market does not deprive its forward contracts of the benefit of the *Mobile-Sierra* presumption. There is no reason why FERC should be able to abro-

gate a contract on these grounds without finding a causal connection between unlawful activity and the contract rate. Where, however, causality has been established, the *Mobile-Sierra* presumption should not apply.

On remand, the Commission should amplify or clarify its findings on these two points. The judgment of the Court of Appeals is affirmed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of these cases.

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

Recommending denial of the petition for certiorari in these cases, the Federal Energy Regulatory Commission urged that review "would be premature" given "the interlocutory nature of th[e] issues." Brief in Opposition for Respondent Federal Energy Regulatory Commission 22, 25. In this regard, the Commission called our attention to "new measures" it had taken, as well as recent enactments by Congress, bearing on "the evaluation of contracts under *Mobile-Sierra*." *Id.*, at 14–16. In view of these developments, the Commission suggested, this Court should await "the better-developed record that would be produced by FER[C] . . . on remand." *Id.*, at 22. I agree that the Court would have been better informed had it awaited the Commission's decision on remand. I think it plain, however, that the Commission erred in the two respects identified by the Court. See *ante*, at 552–554. I therefore concur in the Court's judgment and join Part III of the Court's opinion.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

The basic question presented by these complicated cases is whether "the Federal Energy Regulatory Commission

(FERC or Commission) must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law." *Ante*, at 530. The opening sentence of the Court's opinion tells us that the "*Mobile-Sierra* doctrine"—a term that makes its first appearance in the United States Reports today—mandates an affirmative answer. This holding finds no support in either case that lends its name to the doctrine. Nevertheless, in the interest of guarding against "disfigurement of the venerable *Mobile-Sierra* doctrine," *ante*, at 548, the Court mangles both the governing statute and precedent.

I

Under the Federal Power Act (FPA), 41 Stat. 1063, 16 U. S. C. § 791a *et seq.*, wholesale electricity prices are established in the first instance by public utilities, either via tariffs or in contracts with purchasers. § 824d(c). Whether set by tariff or contract, all rates must be filed with the Commission. See *ibid.* Section 205(a) of the FPA provides, "All rates and charges . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U. S. C. § 824d(a). Pursuant to § 206(a), if FERC determines "that any rate . . . or that any rule, regulation, practice, or contract affect[ing] such rate . . . is unjust [or] unreasonable . . . , the Commission shall determine the just and reasonable rate, . . . rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." 16 U. S. C. § 824e(a) (2000 ed., Supp. V). These provisions distinguish between the ratesetting roles of utilities (which initially set rates) and the Commission (which may override utility-set rates that are not just and reasonable), but they do not distinguish between rates set unilaterally by tariff and rates set bilaterally by contract. However the utility sets its prices, the standard of review is the same—rates must be just and reasonable.

The Court purports to acknowledge that "[t]here is only one statutory standard for assessing wholesale-electricity rates, whether set by contract or tariff—the just-and-reasonable standard." *Ante*, at 545. Unlike rates set by tariff, however, the Court holds that any "freely negotiated" contract rate is presumptively just and reasonable unless it "seriously harms" the public interest. *Ante*, at 530. According to the Court, this presumption represents a "differing *application* of [the] just-and-reasonable standard," but not a different standard altogether. *Ante*, at 535. I disagree. There is no significant difference between requiring a heightened showing to overcome an otherwise conclusive presumption and imposing a heightened standard of review. I agree that applying a separate standard of review to contract rates is "obviously indefensible," *ibid.*, but that is also true with respect to the Court's presumption.

Even if the "*Mobile-Sierra* presumption" were not tantamount to a separate standard, nothing in the statute mandates "differing *application*" of the statutory standard to rates set by contract. *Ibid.* Section 206(a) of the FPA provides, "without qualification or exception," that FERC may replace any unjust or unreasonable contract with a lawful contract. *Permian Basin Area Rate Cases*, 390 U. S. 747, 783–784 (1968) (construing identical language in the Natural Gas Act, 15 U. S. C. §717d(a)). The statute does not say anything about a mandatory presumption for contracts, much less define the burden of proof for overcoming it or delineate the circumstances for its nonapplication. Cf. *ante*, at 530, 547–548. Nor does the statute prohibit FERC from considering marginal cost when reviewing rates set by contract. Cf. *ante*, at 549–551, and n. 5.

If Congress had intended to impose such detailed constraints on the Commission's authority to review contract rates, it would have done so itself in the FPA. Congress instead used the general words "just and reasonable" because it wanted to give FERC, not the courts, wide latitude

in setting policy. As we explained in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984):

> "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (Footnote omitted.)

Consistent with this understanding of administrative law, our cases interpreting the FPA have invariably "emphasized that courts are without authority to set aside any rate adopted by the Commission which is within a 'zone of reasonableness.'" *Permian Basin*, 390 U. S., at 797. But see *ante*, at 548 (asserting that "a 'zone of reasonableness' test . . . fails to accord an adequate level of protection to contracts"). This deference makes eminent sense because "rate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Permian Basin*, 390 U. S., at 776–777. Despite paying lipservice to this principle, see *ante*, at 532, the Court binds the Commission to a rigid formula of the Court's own making.

Having found no statutory text that supports its vision of the *Mobile-Sierra* doctrine, the Court invokes the "important role of contracts in the FPA." *Ante*, at 551. But contracts play an "important role" in the FPA only insofar as the statute "departed from the scheme of purely tariff-based regulation." *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 479 (2002). In allowing parties to establish rates by contract, Congress did not intend to immunize such rates from just-and-reasonable review. Both *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956), the supposed progenitors of the "*Mobile-Sierra* presumption," make this point in no uncertain terms. See *id.*, at 353 ("The Commission has undoubted power under §206(a) to prescribe a change in contract rates whenever it determines such rates to be unlawful"); *Mobile*, 350 U. S., at 344 ("[C]ontracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest").[1] Accordingly, the fact that the FPA tolerates contracts does not make it subservient to contracts.

II

Neither of the eponymous cases in the "*Mobile-Sierra* presumption," nor any of our subsequent decisions, substantiates the Court's atextual reading of §§205 and 206.

As the Court acknowledges, *Mobile* itself says nothing about what standard of review applies to rates established by contract. See *ante*, at 532–533. Rather, *Mobile* merely held that utilities cannot unilaterally abrogate contracts with

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[1] See also, *e. g.*, *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S. 571, 582 (1981) *(Arkla)* ("[T]he clear purpose of the congressional scheme" for rate filing is to "gran[t] the Commission an opportunity in every case to judge the reasonableness of the rate"); *Permian Basin Area Rate Cases*, 390 U. S. 747, 784 (1968) ("[T]he Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests").

purchasers by filing new rate schedules with the Commission. See 350 U. S., at 339–341. The Court neglects to mention, however, that although *Mobile* had no occasion to comment on the standard of review, it did imply that Congress would not have permitted parties to establish rates by contract but for "the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." *Id.*, at 339.

In *Sierra*, a public utility entered into a long-term contract to sell electricity "at a special low rate" in order to forestall potential competition. See 350 U. S., at 351–352. Several years later the utility complained that the rate provided too little profit and was therefore not "just and reasonable." The Commission agreed and set aside the rate "solely because it yield[ed] less than a fair return on the net invested capital." See *id.*, at 354–355. The Court vacated and remanded on the ground that the Commission had applied an erroneous standard. "[W]hile it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return," the Court reasoned, "it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain." *Id.*, at 355. When the seller has agreed to a rate that it later challenges as too low, "the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Ibid.* The Court further elaborated on what it meant by the "public interest":

> "That the purpose of the power given the Commission by §206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in §201 of the Act that the

> scheme of regulation imposed 'is necessary in the public interest.' When §206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility." *Ibid.*

Sierra therefore held that, in accordance with the statement of policy in the FPA, 16 U. S. C. §824(a), whether a rate is "just and reasonable" is measured against the public interest, not the private interests of regulated sellers. Contrary to the opinion of the Court, see *ante*, at 551–552, n. 6, *Sierra* instructs that the public interest is the touchstone for just-and-reasonable review of *all* rates, not just contract rates. *Sierra* drew a distinction between the Commission's authority to *impose* low rates on utilities and its authority to *abrogate* low rates agreed to by utilities because these actions impact the public interest differently, not because the public interest governs rates set bilaterally but not rates set unilaterally. When the Commission imposes rates that afford less than a fair return, it compromises the public's interest in attracting necessary capital. The impact is different, however, if a utility has agreed to a low rate because investors recognize that the utility, not the regulator, is responsible for the unattractive rate of return.

Sierra used "public interest" as shorthand for the interest of consumers in paying "the 'lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.'" *Permian Basin*, 390 U. S., at 793 (quoting *Atlantic Refining Co.* v. *Public Serv. Comm'n of N. Y.*, 360 U. S. 378, 388 (1959)). Whereas high rates directly implicate this interest, low rates do so only indirectly, such as when the rate is so low that it "might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Sierra*, 350 U. S., at 355. Nothing in *Sierra* purports to mandate a "serious harm" standard of review, or to require any assumption that high rates and low rates impose

symmetric burdens on the public interest. As we later explained in *FPC* v. *Texaco Inc.*, 417 U. S. 380, 399 (1974), the Commission cannot ignore even "a small dent in the consumer's pocket" because "the Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted."

Brushing aside the text of the FPA, as well as the holdings in *Mobile* and *Sierra* themselves, the Court cherry picks language from *Verizon*, *Arkla*, and *Permian Basin*. Both *Verizon* and *Arkla* mentioned the *Mobile-Sierra* line of cases only in passing, and neither case had anything to do with just-and-reasonable review of rates. See *Verizon*, 535 U. S., at 479; *Arkla*, 453 U. S. 571, 582 (1981). Furthermore, the statement in *Permian Basin* about "unequivocal public necessity," 390 U. S., at 822, speaks to the difficulty of establishing injury to the public interest in the context of a low-rate challenge, not a high-rate challenge.[2] The Court's reliance

[2]The Court repeatedly quotes the following snippet from the 75-page opinion in *Permian Basin:* "The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." 390 U. S., at 822 (cited *ante*, at 534, 550, 553). Like *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956), however, *Permian Basin* made this statement in the course of rejecting a low-rate challenge. Read in context, the Court's reference to "unequivocal public necessity" is a loose restatement of *Sierra*, which required "evidence of injury to the public interest," and which underscored how rarely a utility will be able to demonstrate that a "contract price is so 'low as to adversely affect the public interest.'" 390 U. S., at 820–821 (quoting *Sierra*, 350 U. S., at 355). The Court's expansive reading of the "unequivocal public necessity" statement cannot be squared with *Permian Basin*'s discussion of the Commission's authority to review rates set by contract: "Although the Natural Gas Act is premised upon a continuing system of private contracting, the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." 390 U. S., at 784 (citation omitted). Nor can it be reconciled with *Permian Basin*'s rejection of the producers' arguments (1) that the Commission "wrongly invalidated existing contracts" by imposing a ceiling on rates, see *id.*, at 781–784, and (2) that the Commission was compelled

on these few stray sentences calls to mind our admonishment in *Permian Basin:* "The Commission's exercise of its regulatory authority must be assessed in light of its purposes and consequences, and not by references to isolated phrases from previous cases." *Id.*, at 791, n. 60.

III

Lacking any grounding in the FPA or precedent, the Court concludes, as a matter of policy, that the *Mobile-Sierra* presumption is necessary to ensure stability in volatile energy markets and to reduce regulatory costs. See *ante*, at 551. Of course, "the desirability of fostering market-stabilizing long-term contracts," *ante*, at 553, plays into the public interest insofar as the "Commission's responsibilities include the protection of future, as well as present, consumer interests," *Permian Basin*, 390 U. S., at 798; see also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103, 113 (1958) ("It seems plain that Congress . . . was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake"). But under the FPA, Congress has charged FERC, not the courts, with balancing the short-term and long-term interests of consumers. See *Permian Basin*, 390 U. S., at 792 ("The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors").

Moreover, not even FERC has the authority to endorse the rule announced by the Court today. The FPA does not indulge, much less require, a "practically insurmountable"

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to adopt contract prices as the basis for computing area rates, see *id.*, at 792–795.

presumption, see *Papago Tribal Util. Auth.* v. *FERC*, 723 F. 2d 950, 954 (CADC 1983) (opinion for the court by Scalia, J.), that all rates set by contract comport with the public interest and are therefore just and reasonable. Congress enacted the FPA precisely because it concluded that regulation was necessary to protect consumers from deficient markets. It follows, then, that "the Commission lacks the authority to place exclusive reliance on market prices." *Texaco*, 417 U. S., at 400; see also *id.*, at 399 ("In subjecting producers to regulation because of anticompetitive conditions in the industry, Congress could not have assumed that 'just and reasonable' rates could conclusively be determined by reference to market price"). For this reason, we have already rejected the policy rationale proffered by the Court today:

> "It may be, as some economists have persuasively argued, that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today. It may also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process." *Id.*, at 400 (footnote omitted).

Balancing the short-term and long-term interests of consumers entails difficult judgment calls, and to the extent FERC actually engages in this balancing, its reasoned determination is entitled to deference. But FERC cannot abdicate its statutory responsibility to ensure just and reasonable rates through the expedient of a heavyhanded presumption.

This is not to say that the Commission should abrogate any contract that increases rates, but to underscore that the agency is "obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress." *Permian Basin*, 390 U. S., at 791.

IV

Even if, as the Court holds today, the "*Mobile-Sierra* presumption" is merely a "differing *application*" of the statutory just-and-reasonable standard, FERC's orders must be set aside because they were not decided on this basis.

The FERC orders repeatedly aver that the agency is applying a "public interest" standard different from and distinctly more demanding than the statutory standard. See, *e. g.*, App. 1198a ("[T]he burden of showing that a contract is contrary to the public interest is a higher burden than showing that a contract is not just and reasonable. . . . The fact that a contract may be found to be unjust and unreasonable under [§§205 and 206] does not in and of itself demonstrate that the contract is contrary to the public interest under the Supreme Court cases"). Indeed, the Commission's misunderstanding of our cases is so egregious that the sellers, concerned that the orders would be overturned, asked the Commission for "clarification that the public interest standard of review does not authorize unjust and unreasonable rates." *Id.*, at 1506a, 1567a. FERC clarified as follows:

> "[I]f rates . . . become unjust and unreasonable and the contract at issue is subject to the *Mobile-Sierra* standard of review, the Commission under court precedent may not change the contract simply because it is no longer just and reasonable. If parties' market-based rate contracts provide for the public interest standard of review, the Commission is bound to a higher burden to support modification of such contracts." *Id.*, at 1506a, 1567a.

Whereas in *Texaco* we faulted the Commission for failing to "expressly mention the just-and-reasonable standard," 417 U. S., at 396, in these cases FERC refused outright to apply that standard.[3]

In addition to misrepresenting FERC's understanding of the *Mobile-Sierra* doctrine as a presumption rather than a separate standard, the Court overstates the extent to which FERC considered the lawfulness of the rates. The Court recognizes, as it must, that the three factors identified in *Sierra* are neither exclusive nor "precisely applicable to the high-rate challenge of a purchaser." See *ante*, at 548; Brief for Respondent FERC 41–42. Although FERC applied what it termed the "*Sierra* Three-Prong Test," App. 1276a, the Court contends the agency did not err because it also evaluated the "'totality of [the] circumstances,'" see *ante*, at 549. But FERC's totality-of-the-circumstances review was infected by its misapprehension of the standard "dictated by the U. S. Supreme Court under the *Mobile-Sierra* doctrine." App. 1229a.

Whereas the focus of §§205(a) and 206(a) is on the reasonableness of the rates charged, not the conduct of the contracting parties, FERC restricted its review to the contracting parties' behavior around the time of formation. See *id.*, at 1280a–1284a. FERC seems to have thought it was powerless to conduct just-and-reasonable review unless the contract was already subject to abrogation based on contract defenses such as fraud or duress. By including contracts within the scope of §206(a), however, Congress must have concluded that contract defenses are insufficient to protect the public interest. But see *ante*, at 547 (holding that the

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[3]The Court contends that FERC's application of the *Mobile-Sierra* doctrine "should be honored" because it represents the "settled understanding of the FPA." *Ante*, at 552, n. 6. As explained above, however, FERC's interpretation of the FPA (and of our cases construing the FPA) is "'obviously indefensible,'" *supra*, at 557 (quoting *ante*, at 535), and is therefore not entitled to any deference.

"*Mobile-Sierra* presumption" applies in all circumstances absent "traditional grounds for . . . abrogation" or "illegal action" by a contracting party).[4] Indeed, nothing in the FPA or this Court's cases precludes FERC from considering circumstances exogenous to contract negotiations, including natural disasters and market manipulation by entities not parties to the challenged contract.[5] FERC's error is obvious from the face of the orders, which repeatedly state the Commission's belief that it could not consider evidence relevant to the reasonableness of the contract rates.[6]

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[4]The Court quite sensibly instructs FERC that "if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable"; and that the "mere fact that the unlawful activity occurred in a different (but related) market does not automatically establish that it had no effect upon the contract—especially given the Staff Report's (unsurprising) finding that high prices in the one market produced high prices in the other." *Ante*, at 554. I disagree, however, with the Court's suggestion that the FPA restricts FERC's review of contract rates to these limited criteria.

[5]The FPA does not specify how market deficiencies should weigh in FERC's review of contract rates. Depending on the circumstances and how one balances the short-term and long-term interests of consumers, evidence of "market turmoil" may, as the Court argues, support rather than detract from a finding that contract rates are just and reasonable. See *ante*, at 547. Whether any given contract rate "ultimately benefits consumers," *ante*, at 551, however, is a determination that Congress has vested in FERC, not this Court.

[6]See, *e. g.*, App. 1275a ("[A] finding that the unjust and unreasonable spot market prices caused forward bilateral prices to be unjust and unreasonable would be relevant to contract modification only where there is a 'just and reasonable' standard of review. As we have previously concluded, the contracts at issue in this proceeding do not provide for such a standard but rather evidence an intent that the contracts may be changed only pursuant to the 'public interest' standard of review. Under the 'public interest' standard, to justify contract modification it is not enough to show that forward prices became unjust and unreasonable due to the impact of spot market dysfunctions" (footnote omitted)); *id.*, at 1527a ("Complainants were required to meet the public interest standard of review, not the just and reasonable standard of review which could have taken

Although the Court and the Commission attempt to recast FERC's orders as applying the statutory standard, see *ante*, at 542–543; Brief for Respondent FERC 21, under the doctrine set forth in *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), "we cannot accept appellate counsel's *post hoc* rationalizations for agency action; for an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself," *Texaco*, 417 U. S., at 397 (internal quotation marks omitted). Furthermore, even assuming FERC subjectively believed that it was applying the just-and-reasonable standard despite its repeated declarations to the contrary, each order must be deemed "so ambiguous that it falls short of that standard of clarity that administrative orders must exhibit." *Id.*, at 395–396.

In order to get around the *Chenery* doctrine, the Court not only mischaracterizes FERC's orders, but also takes a more radical tack: It concludes that whatever the rationale set forth in FERC's orders, *Chenery* does not apply because "the Commission was *required*, under our decision in *Sierra*, to apply the *Mobile-Sierra* presumption in its evaluation of the contracts here." *Ante*, at 544–545. This point prompts the Court to comment that "FERC has lucked out." *Ante*, at 544. If the Commission has "lucked out," it is not only a purely fortuitous victory, but also a Pyrrhic one. Although FERC prevails in these cases despite having "offered a justification in court different from what it provided in its opinion," *ibid.*, it has paid a tremendous price. The Court has curtailed the agency's authority to interpret the terms "just and reasonable" and thereby substantially narrowed FERC's discretion to protect the public interest by the means it thinks best. Contrary to congressional intent, FERC no

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into account the causal connection between the spot market prices and forward bilateral market prices"); *id.*, at 1534a ("The Staff Report did not make any findings regarding the justness and reasonableness of any contract rates and any such findings would not be relevant here because the just and reasonable standard is not applicable").

longer has the flexibility to adjust its review of contractual rates to account for changing conditions in the energy markets or among consumers. Cf. *Permian Basin*, 390 U. S., at 784 ("[A]dministrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances").

V

The decision of the Court of Appeals for the Ninth Circuit deserves praise for its efforts to bring the freewheeling *Mobile-Sierra* doctrine back in line with the FPA and this Court's cases. I cannot endorse the opinion in its entirety, however, because it verges into the same sort of improper policymaking that I have criticized in the Court's opinion. Both decisions would hobble the Commission, albeit from different sides. Congress has not authorized courts to prescribe energy policy by imposing presumptions or prerequisites, or by making marginal cost the sole concern or no concern at all. I would therefore vacate and remand the cases in order to give the Commission an opportunity to evaluate the contract rates in light of a proper understanding of its discretion.

I respectfully dissent.

Syllabus

DISTRICT OF COLUMBIA ET AL. *v.* HELLER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07–290. Argued March 18, 2008—Decided June 26, 2008

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed this suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

Held:

1. The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. Pp. 576–626.

(a) The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms. Pp. 576–595.

(b) The prefatory clause comports with the Court's interpretation of the operative clause. The "militia" comprised all males physically capable of acting in concert for the common defense. The Antifederalists feared that the Federal Government would disarm the people in order to disable this citizens' militia, enabling a politicized standing army or a select militia to rule. The response was to deny Congress power to abridge the ancient right of individuals to keep and bear arms, so that the ideal of a citizens' militia would be preserved. Pp. 595–600.

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(c) The Court's interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed the Second Amendment. Pp. 600–603.

(d) The Second Amendment's drafting history, while of dubious interpretive worth, reveals three state Second Amendment proposals that unequivocally referred to an individual right to bear arms. Pp. 603–605.

(e) Interpretation of the Second Amendment by scholars, courts, and legislators, from immediately after its ratification through the late 19th century, also supports the Court's conclusion. Pp. 605–619.

(f) None of the Court's precedents forecloses the Court's interpretation. Neither *United States* v. *Cruikshank*, 92 U. S. 542, 553, nor *Presser* v. *Illinois*, 116 U. S. 252, 264–265, refutes the individual-rights interpretation. *United States* v. *Miller*, 307 U. S. 174, does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, *i. e.*, those in common use for lawful purposes. Pp. 619–626.

2. Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *Miller*'s holding that the sorts of weapons protected are those "in common use at the time" finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons. Pp. 626–628.

3. The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the Second Amendment. The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. Because Heller conceded at oral argument that the D. C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and

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does not address the licensing requirement. Assuming he is not disqualified from exercising Second Amendment rights, the District must permit Heller to register his handgun and must issue him a license to carry it in the home. Pp. 628–636.

478 F. 3d 370, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 636. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 681.

Walter Dellinger argued the cause for petitioners. With him on the briefs were *Peter J. Nickles*, Attorney General for the District of Columbia, *Linda Singer*, former Attorney General for the District of Columbia, *Alan B. Morrison*, *Todd S. Kim*, Solicitor General, *Donna M. Murasky*, Deputy Solicitor General, *Lutz Alexander Prager*, *Robert A. Long, Jr.*, *Jonathan L. Marcus*, *Thomas C. Goldstein*, *Matthew M. Shors*, and *Mark S. Davies*.

Alan Gura argued the cause for respondent. With him on the brief were *Robert A. Levy* and *Clark M. Neily III*.

Former *Solicitor General Clement* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Garre*, *Assistant Attorney General Fisher*, *Acting Assistant Attorney General Bucholtz*, *Malcolm L. Stewart*, and *Stephen R. Rubenstein*.*

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*Briefs of *amici curiae* urging reversal were filed for the City of Chicago et al. by *Andrew L. Frey*, *David M. Gossett*, *Benna Ruth Solomon*, *Patrick J. Rocks*, and *Lee Ann Lowder*; for the American Academy of Pediatrics et al. by *Bert H. Deixler* and *Lary Alan Rappaport*; for the American Bar Association by *William H. Neukom*, *Robert N. Weiner*, and *John A. Freedman*; for the American Jewish Committee et al. by *Jeffrey A. Lamken*, *Allyson N. Ho*, *D. Randall Benn*, *Jeffrey L. Kessler*, *William C. Heuer*, *Robert E. Cortes*, and *Sayre Weaver*; for the Brady Center to Prevent Gun Violence et al. by *John Payton*, *Jonathan G. Cedarbaum*, *Dennis A. Henigan*, *Brian J. Siebel*, and *Jonathan E. Lowy*; for the DC Appleseed Center for Law and Justice et al. by *Jonathan S. Franklin*; for

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

District Attorneys by *Alexis S. Coll-Very*, *Simona G. Strauss*, the *Honorable Robert M. Morgenthau*, *Mark Dwyer*, the *Honorable Charles J. Hynes*, and *Laurie L. Levenson*; for Former Department of Justice Officials by *Messrs. Long* and *Marcus*; for Major American Cities et al. by *Jeffrey L. Bleich*, *George A. Nilson*, *William R. Phelan, Jr.*, *Debra Lynn Gonzales*, *Michael A. Cardozo*, *Leonard J. Koerner*, *Richard Feder*, *Dennis J. Herrera*, *Danny Chou*, and *John Daniel Reaves*; for Members of Congress by *Scott E. Gant* and *Christopher L. Hayes*; for the NAACP Legal Defense & Educational Fund, Inc., by *Theodore M. Shaw*, *Jacqueline A. Berrien*, *Victor A. Bolden*, *Debo P. Adegbile*, *Michael B. de Leeuw*, and *Darcy M. Goddard*; for the National Network to End Domestic Violence et al. by *Bruce D. Sokler*; for Professors of Criminal Justice by *Albert W. Wallis*; for Professors of Linguistics and English by *Charles M. Dyke*, *Charles M. English*, *Jeffrey R. Gans*, *Elizabeth M. Walsh*, and *Frederick L. Whitmer*; for the Violence Policy Center et al. by *Daniel G. Jarcho*; and for Jack N. Rakove et al. by *Carl T. Bogus*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Andrew M. Cuomo*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Michelle Aronowitz*, Deputy Solicitor General, *Sasha Samberg-Champion*, Assistant Solicitor General, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Mark J. Bennett* of Hawaii, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, and *Anne Milgram* of New Jersey; for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *R. Ted Cruz*, Solicitor General, *Kent C. Sullivan*, First Assistant Attorney General, *David S. Morales*, Deputy Attorney General for Civil Litigation, *Sean D. Jordan*, Deputy Solicitor General, *Michael P. Murphy*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Talis J. Colberg* of Alaska, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Stephen N. Six* of Kansas, *Jack Conway* of Kentucky, *James D. Caldwell* of Louisiana, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Kelly A. Ayotte* of New Hampshire, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Marc*

I

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered

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Dann of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, *Robert F. McDonnell* of Virginia, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; for the State of Wisconsin by *J. B. Van Hollen*, Attorney General of Wisconsin, and *Christopher G. Wren* and *Steven P. Means*, Assistant Attorneys General; for Academics et al. by *Richard E. Gardiner;* for Academics for the Second Amendment by *David T. Hardy, Joseph Edward Olson, Daniel D. Polsby, Henry C. Karlson, Randy E. Barnett*, and *Michael Ian Krauss;* for the Alaska Outdoor Council et al. by *Jack Brian McGee;* for the American Center for Law and Justice by *Jay Alan Sekulow, Stuart J. Roth, Colby M. May*, and *James M. Henderson, Sr.;* for the American Civil Rights Union by *Peter J. Ferrara;* for the American Legislative Exchange by *Robert Dowlut;* for the Association of American Physicians and Surgeons, Inc., by *Andrew L. Schlafly;* for the Cato Institute et al. by *C. Kevin Marshall;* for the Center for Individual Freedom by *Renee L. Giachino;* for the Citizens Committee for the Right to Keep and Bear Arms et al. by *Jeffrey B. Teichert;* for the Congress of Racial Equality by *Stefan Bijan Tahmassebi;* for Criminologists et al. by *Marc James Ayers* and *Don B. Kates;* for Disabled Veterans for Self-Defense et al. by *James H. Warner;* for the Eagle Forum Education & Legal Defense Fund by *Douglas G. Smith;* for the Foundation for Free Expression by *Deborah J. Dewart* and *James L. Hirsen;* for the Foundation for Moral Law by *Gregory M. Jones* and *Benjamin D. DuPré;* for the Goldwater Institute by *Bradford A. Berenson, Ileana Maria Ciobanu*, and *Clint Bolick;* for Grass Roots of South Carolina, Inc., by *R. Jeffords Barham;* for Gun Owners of America, Inc., et al. by *Herbert W. Titus* and *William J. Olson;* for the Heartland Institute by *Richard K. Willard;* for the Institute for Justice by *Erik S. Jaffe, William H. Mellor*, and *Steven M. Simpson;* for the International Law Enforcement Educators and Trainers Association et al. by *David B. Kopel* and *C. D. Michel;* for International Scholars by *James R. Schaller;* for Jews for the Preservation of Firearms Ownership by *Daniel L. Schmutter;* for the Libertarian National Committee, Inc., by *Bob Barr;* for the Maricopa County Attorney's Office et al. by *Daryl Manhart, Andrew P. Thomas, Arthur E. Mallory, Hy Forgeron*, and *Bryan A. Skoric;* for the Mountain States Legal Foundation by *William Perry Pendley;* for the National Rifle Association et al. by *Stephen D. Poss, Kevin P. Martin,*

firearm, and the registration of handguns is prohibited. See D. C. Code §§ 7–2501.01(12), 7–2502.01(a), 7–2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. See §§ 22–4504(a), 22–4506. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and disassembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities. See § 7–2507.02.[1]

Respondent Dick Heller is a D. C. special police officer authorized to carry a handgun while on duty at the Thurgood Marshall Judiciary Building. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of Columbia seeking,

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and *Scott B. Nardi*; for the National Shooting Sports Foundation, Inc., by *Lawrence G. Keane*, *Christopher P. Johnson*, and *Kanchana Wangkeo Leung*; for Ohio Concealed Carry Permitholders et al. by *Jeanette M. Moll*; for the Paragon Foundation, Inc., by *Paul M. Kienzle III*; for Pink Pistols et al. by *Michael B. Minton*; for Retired Military Officers by *Andrew G. McBride*; for the Rutherford Institute by *John W. Whitehead*; for the Second Amendment Foundation by *Nelson Lund*; for the Southeastern Legal Foundation, Inc., et al. by *Shannon Lee Goessling*; for State Firearm Associations by *David J. Schenck*; for Virginia1774.org by *Richard E. Hill, Jr.*; for Major General John D. Altenburg, Jr., et al. by *C. Allen Foster*, *Robert P. Charrow*, *John D. Altenburg, Jr.*, and *John P. Einwechter*; for Dr. Suzanna Gratia Hupp, D. C., et al. by *Kelly J. Shackelford*; for the President *Pro Tempore* of the Senate of Pennsylvania Joseph B. Scarnati III by *John P. Krill, Jr.*, and *Linda J. Shorey*; and for 55 Members of the United States Senate et al. by *Stephen P. Halbrook*.

Briefs of *amici curiae* were filed for the American Public Health Association et al. by *Alison M. Tucher*; for GeorgiaCarry.Org, Inc., by *John R. Monroe* and *Edward A. Stone*; for Erwin Chemerinsky et al. by *Mr. Chemerinsky, pro se*; and for 126 Women State Legislators et al. by *M. Carol Bambery*.

[1] There are minor exceptions to all of these prohibitions, none of which is relevant here.

on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of "functional firearms within the home." App. 59a. The District Court dismissed respondent's complaint, see *Parker* v. *District of Columbia*, 311 F. Supp. 2d 103, 109 (2004). The Court of Appeals for the District of Columbia Circuit, construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense,[2] reversed, see *Parker* v. *District of Columbia*, 478 F. 3d 370, 401 (2007). It held that the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. See *id.*, at 395, 399–401. The Court of Appeals directed the District Court to enter summary judgment for respondent.

We granted certiorari. 552 U. S. 1035 (2007).

II

We turn first to the meaning of the Second Amendment.

A

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States* v. *Sprague*, 282 U. S. 716, 731 (1931); see also *Gibbons* v. *Ogden*, 9 Wheat. 1, 188 (1824). Normal meaning may of

[2] That construction has not been challenged here.

course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. See Brief for Petitioners 11–12; *post*, at 636–637 (STEVENS, J., dissenting). Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. See Brief for Respondent 2–4.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." See J. Tiffany, A Treatise on Government and Constitutional Law §585, p. 394 (1867); Brief for Professors of Linguistics and English as *Amici Curiae* 3 (hereinafter Linguists' Brief). Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose. See generally Volokh, The Commonplace Second Amendment, 73 N. Y. U. L. Rev. 793, 814–821 (1998).

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, "A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed." That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause.

("The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence." The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Dwarris, A General Treatise on Statutes 268–269 (P. Potter ed. 1871); T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 42–45 (2d ed. 1874).[3] "'It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'" J. Bishop, Commentaries on Written Laws and Their Interpretation § 51, p. 49 (1882) (quoting *Rex* v. *Marks*, 3 East 157, 165, 102 Eng. Rep. 557, 560 (K. B. 1802)). Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.[4]

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[3] As Sutherland explains, the key 18th-century English case on the effect of preambles, *Copeman* v. *Gallant*, 1 P. Wms. 314, 24 Eng. Rep. 404 (1716), stated that "the preamble could not be used to restrict the effect of the words used in the purview." 2A N. Singer, Sutherland on Statutory Construction § 47.04, pp. 145–146 (rev. 5th ed. 1992). This rule was modified in England in an 1826 case to give more importance to the preamble, but in America "the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms." *Id.*, at 146.

JUSTICE STEVENS says that we violate the general rule that every clause in a statute must have effect. *Post*, at 643. But where the text of a clause itself indicates that it does not have operative effect, such as "whereas" clauses in federal legislation or the Constitution's preamble, a court has no license to make it do what it was not designed to do. Or to put the point differently, operative provisions should be given effect as operative provisions, and prologues as prologues.

[4] JUSTICE STEVENS criticizes us for discussing the prologue last. *Ibid.* But if a prologue can be used only to clarify an ambiguous operative provision, surely the first step must be to determine whether the operative

1. Operative Clause.

a. "Right of the People." The first salient feature of the operative clause is that it codifies a "right of the people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.[5]

Three provisions of the Constitution refer to "the people" in a context other than "rights"—the famous preamble ("We the people"), § 2 of Article I (providing that "the people" will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively—

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provision is ambiguous. It might be argued, we suppose, that the prologue itself should be one of the factors that go into the determination of whether the operative provision is ambiguous—but that would cause the prologue to be used to produce ambiguity rather than just to resolve it. In any event, even if we considered the prologue *along with* the operative provision we would reach the same result we do today, since (as we explain) our interpretation of "the right of the people to keep and bear arms" furthers the purpose of an effective militia no less than (indeed, more than) the dissent's interpretation. See *infra*, at 599–600.

[5] JUSTICE STEVENS is of course correct, *post*, at 645, that the right to assemble cannot be exercised alone, but it is still an individual right, and not one conditioned upon membership in some defined "assembly," as he contends the right to bear arms is conditioned upon membership in a defined militia. And JUSTICE STEVENS is dead wrong to think that the right to petition is "primarily collective in nature." *Ibid.* See *McDonald* v. *Smith*, 472 U. S. 479, 482–484 (1985) (describing historical origins of right to petition).

but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.[6]

What is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset. As we said in *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 265 (1990):

> "'[T]he people' seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

This contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right

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[6] If we look to other founding-era documents, we find that some state constitutions used the term "the people" to refer to the people collectively, in contrast to "citizen," which was used to invoke individual rights. See Heyman, Natural Rights and the Second Amendment, in The Second Amendment in Law and History 179, 193–195 (C. Bogus ed. 2000) (hereinafter Bogus). But that usage was not remotely uniform. See, *e. g.*, N. C. Declaration of Rights § XIV (1776), in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 2787, 2788 (F. Thorpe ed. 1909) (hereinafter Thorpe) (jury trial); Md. Declaration of Rights § XVIII (1776), in 3 *id.*, at 1686, 1688 (vicinage requirement); Vt. Declaration of Rights, ch. 1, § XI (1777), in 6 *id.*, at 3737, 3741 (searches and seizures); Pa. Declaration of Rights § XII (1776), in 5 *id.*, at 3082, 3083 (free speech). And, most importantly, it was clearly not the terminology used in the Federal Constitution, given the First, Fourth, and Ninth Amendments.

to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

b. "Keep and Bear Arms." We move now from the holder of the right—"the people"—to the substance of the right: "to keep and bear Arms."

Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "[w]eapons of offence, or armour of defence." 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. For instance, Cunningham's legal dictionary gave as an example of usage: "Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms." See also, *e. g.*, An Act for the trial of Negroes, 1797 Del. Laws ch. XLIII, §6, in 1 First Laws of the State of Delaware 102, 104 (J. Cushing ed. 1981 (pt. 1)); see generally *State* v. *Duke*, 42 Tex. 455, 458 (1874) (citing decisions of state courts construing "arms"). Although one founding-era thesaurus limited "arms" (as opposed to "weapons") to "instruments of offence *generally* made use of in war," even that source stated that all firearms constituted "arms." 1 J. Trusler, The Distinction Between Words Es-

teemed Synonymous in the English Language 37 (3d ed. 1794) (emphasis added).

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e. g.*, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e. g.*, *Kyllo* v. *United States*, 533 U. S. 27, 35–36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Johnson 1095. Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons."

The phrase "keep arms" was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to "keep arms in their houses." 4 Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone); see also 1 W. & M., ch. 15, § 4, in 3 Eng. Stat. at Large 422 (1689) ("[N]o Papist . . . shall or may have or keep in his House . . . any Arms . . . "); 1 W. Hawkins, Treatise on the Pleas of the Crown 26 (1771) (similar). Petitioners point to militia laws of the founding period that required militia members to "keep" arms in connection with

militia service, and they conclude from this that the phrase "keep Arms" has a militia-related connotation. See Brief for Petitioners 16–17 (citing laws of Delaware, New Jersey, and Virginia). This is rather like saying that, since there are many statutes that authorize aggrieved employees to "file complaints" with federal agencies, the phrase "file complaints" has an employment-related connotation. "Keep arms" was simply a common way of referring to possessing arms, for militiamen *and everyone else*.[7]

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[7] See, *e. g.*, 3 A Compleat Collection of State-Tryals 185 (1719) ("Hath not every Subject power to keep Arms, as well as Servants in his House for defence of his Person?"); T. Wood, A New Institute of the Imperial or Civil Law 282 (4th ed. corrected 1730) ("Those are guilty of *publick* Force, who keep Arms in their Houses, and make use of them otherwise than upon Journeys or Hunting, or for Sale . . . "); A Collection of All the Acts of Assembly, Now in Force, in the Colony of Virginia 596 (1733) ("Free Negros, Mulattos, or Indians, and Owners of Slaves, seated at Frontier Plantations, may obtain Licence from a Justice of Peace, for keeping Arms, &c."); J. Ayliffe, A New Pandect of *Roman* Civil Law 195 (1734) ("Yet a Person might keep Arms in his House, or on his Estate, on the Account of Hunting, Navigation, Travelling, and on the Score of Selling them in the way of Trade or Commerce, or such Arms as accrued to him by way of Inheritance"); J. Trusler, A Concise View of the Common Law and Statute Law of England 270 (1781) ("[I]f [papists] keep arms in their houses, such arms may be seized by a justice of the peace"); Some Considerations on the Game Laws 54 (1796) ("Who has been deprived by [the law] of keeping arms for his own defence? What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . . ?"); 3 B. Wilson, The Works of the Honourable James Wilson 84 (1804) (with reference to state constitutional right: "This is one of our many renewals of the Saxon regulations. 'They were bound,' says Mr. Selden, 'to keep arms for the preservation of the kingdom, and of their own persons' "); W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31–32 (1833) (with reference to colonists' English rights: "The right of every individual to keep arms for his defence, suitable to his condition and degree; which was the public allowance, under due restrictions of the natural right of resistance and self-preservation"); 3 R. Burn, Justice of the Peace and Parish Officer 88 (29th ed. 1845) ("It is, however, laid down by Serjeant *Hawkins*, . . . that

At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In *Muscarello* v. *United States*, 524 U. S. 125 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, JUSTICE GINSBURG wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Id.*, at 143 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1990)). We think that JUSTICE GINSBURG accurately captured the natural meaning of "bear arms." Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and

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if a lessee, after the end of the term, keep arms in his house to oppose the entry of the lessor, . . . "); *State* v. *Dempsey*, 31 N. C. 384, 385 (1849) (citing 1840 state law making it a misdemeanor for a member of certain racial groups "to carry about his person or keep in his house any shot gun or other arms").

the state."[8] It is clear from those formulations that "bear arms" did not refer only to carrying a weapon in an organized military unit. Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right, for example, as a recognition of the natural right of defense "of one's person or house"—what he called the law of "self preservation." 2 Collected Works of James Wilson 1142, and n. x (K. Hall & M. Hall eds. 2007) (citing Pa. Const., Art. IX, §21 (1790)); see also T. Walker, Introduction to American Law 198 (1837) ("Thus the right of self-defence [is] guaranteed by the [Ohio] constitution"); see also *id.*, at 157 (equating Second Amendment with that provision of the Ohio Constitution). That was also the interpretation of those state constitutional provisions adopted by pre-Civil War state courts.[9] These pro-

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[8] See Pa. Declaration of Rights § XIII, in 5 Thorpe 3083 ("That the people have a right to bear arms for the defence of themselves and the state . . . "); Vt. Declaration of Rights, ch. 1, § XV, in 6 *id.*, at 3741 ("That the people have a right to bear arms for the defence of themselves and the State . . . "); Ky. Const., Art. XII, §23 (1792), in 3 *id.*, at 1264, 1275 ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned"); Ohio Const., Art. VIII, §20 (1802), in 5 *id.*, at 2901, 2911 ("That the people have a right to bear arms for the defence of themselves and the State . . . "); Ind. Const., Art. I, §20 (1816), in 2 *id.*, at 1057, 1059 ("That the people have a right to bear arms for the defense of themselves and the State . . . "); Miss. Const., Art. I, §23 (1817), in 4 *id.*, at 2032, 2034 ("Every citizen has a right to bear arms, in defence of himself and the State"); Conn. Const., Art. First, §17 (1818), in 1 *id.*, at 536, 538 ("Every citizen has a right to bear arms in defense of himself and the state"); Ala. Const., Art. I, §23 (1819), in *id.*, at 96, 98 ("Every citizen has a right to bear arms in defence of himself and the State"); Mo. Const., Art. XIII, §3 (1820), in 4 *id.*, at 2150, 2163 ("[T]hat their right to bear arms in defence of themselves and of the State cannot be questioned"). See generally Volokh, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L. & Politics 191 (2006).

[9] See *Bliss* v. *Commonwealth*, 2 Litt. 90, 91–92 (Ky. 1822); *State* v. *Reid*, 1 Ala. 612, 616–617 (1840); *State* v. *Schoultz*, 25 Mo. 128, 155 (1857); see also *Simpson* v. *State*, 5 Yer. 356, 360 (Tenn. 1833) (interpreting similar provision with "'common defence'" purpose); *State* v. *Huntly*, 25 N. C. 418, 422–423 (1843) (same); cf. *Nunn* v. *State*, 1 Ga. 243, 250–251 (1846) (con-

visions demonstrate—again, in the most analogous linguistic context—that "bear arms" was not limited to the carrying of arms in a militia.

The phrase "bear Arms" also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: "to serve as a soldier, do military service, fight" or "to wage war." See Linguists' Brief 18; *post*, at 646 (STEVENS, J., dissenting). But it *unequivocally* bore that idiomatic meaning only when followed by the preposition "against," which was in turn followed by the target of the hostilities. See 2 Oxford 21. (That is how, for example, our Declaration of Independence ¶ 28 used the phrase: "He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country . . . .") Every example given by petitioners' *amici* for the idiomatic meaning of "bear arms" from the founding period either includes the preposition "against" or is not clearly idiomatic. See Linguists' Brief 18–23. Without the preposition, "bear arms" normally meant (as it continues to mean today) what JUSTICE GINSBURG's opinion in *Muscarello* said.

In any event, the meaning of "bear arms" that petitioners and JUSTICE STEVENS propose is *not even* the (sometimes) idiomatic meaning. Rather, they manufacture a hybrid definition, whereby "bear arms" connotes the actual carrying of arms (and therefore is not really an idiom) but only in the service of an organized militia. No dictionary has ever adopted that definition, and we have been apprised of no source that indicates that it carried that meaning at the time of the founding. But it is easy to see why petitioners and the dissent are driven to the hybrid definition. Giving "bear Arms" its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed. See L. Levy, Origins of the Bill of Rights 135 (1999). Worse still,

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struing Second Amendment); *State* v. *Chandler*, 5 La. Ann. 489, 489–490 (1850) (same).

the phrase "keep and bear Arms" would be incoherent. The word "Arms" would have two different meanings at once: "weapons" (as the object of "keep") and (as the object of "bear") one-half of an idiom. It would be rather like saying "He filled and kicked the bucket" to mean "He filled the bucket and died." Grotesque.

Petitioners justify their limitation of "bear arms" to the military context by pointing out the unremarkable fact that it was often used in that context—the same mistake they made with respect to "keep arms." It is especially unremarkable that the phrase was often used in a military context in the federal legal sources (such as records of congressional debate) that have been the focus of petitioners' inquiry. Those sources would have had little occasion to use it *except* in discussions about the standing army and the militia. And the phrases used primarily in those military discussions include not only "bear arms" but also "carry arms," "possess arms," and "have arms"—though no one thinks that those *other* phrases also had special military meanings. See Barnett, Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia? 83 Texas L. Rev. 237, 261 (2004). The common references to those "fit to bear arms" in congressional discussions about the militia are matched by use of the same phrase in the few nonmilitary federal contexts where the concept would be relevant. See, *e. g.*, 30 Journals of Continental Congress 349–351 (J. Fitzpatrick ed. 1934). Other legal sources frequently used "bear arms" in nonmilitary contexts.[10] Cunningham's legal dictionary, cited

[10] See J. Brydall, Privilegia Magnatud apud Anglos 14 (1704) (Privilege XXXIII) ("In the 21st Year of King Edward the Third, a Proclamation Issued, that no Person should bear any Arms within London, and the Suburbs"); J. Bond, A Compleat Guide to Justices of the Peace 43 (3d ed. 1707) ("Sheriffs, and all other Officers in executing their Offices, and all other persons pursuing Hu[e] and Cry may lawfully bear Arms"); 1 An Abridgment of the Public Statutes in Force and Use Relative to Scotland (1755) (entry for "Arms": "And if any person above described shall have in his custody, use, or bear arms, being thereof convicted before one justice of

above, gave as an example of its usage a sentence unrelated to military affairs ("Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms"). And if one looks beyond legal sources, "bear arms" was frequently used in nonmilitary contexts. See Cramer & Olson, What Did "Bear Arms" Mean in the Second Amendment? 6 Georgetown J. L. & Pub. Pol'y 511 (2008) (identifying numerous nonmilitary uses of "bear arms" from the founding period).

JUSTICE STEVENS points to a study by *amici* supposedly showing that the phrase "bear arms" was most frequently used in the military context. See *post*, at 647–648, n. 9; Linguists' Brief 24. Of course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts. Moreover, the study's collection appears to include (who knows how many times) the idiomatic phrase "bear arms against," which is irrelevant. The *amici* also dismiss examples such as "'bear arms . . . for the purpose of killing game'" because those uses are "expressly

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peace, or other judge competent, summarily, he shall for the first offense forfeit all such arms" (citing 1 Geo., ch. 54, § 1, in 5 Eng. Stat. at Large 90 (1668))); Statute Law of Scotland Abridged 132–133 (2d ed. 1769) ("Acts for disarming the highlands" but "exempting those who have particular licenses to bear arms"); E. de Vattel, The Law of Nations, or, Principles of the Law of Nature 144 (1792) ("Since custom has allowed persons of rank and gentlemen of the army to bear arms in time of peace, strict care should be taken that none but these should be allowed to wear swords"); E. Roche, Proceedings of a Court-Martial, Held at the Council-Chamber, in the City of Cork 3 (1798) (charge VI: "With having held traitorous conferences, and with having conspired, with the like intent, for the purpose of attacking and despoiling of the arms of several of the King's subjects, qualified by law to bear arms"); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822) ("[I]n this country the constitution guarranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify people unnecessarily").

qualified." Linguists' Brief 24. (JUSTICE STEVENS uses the same excuse for dismissing the state constitutional provisions analogous to the Second Amendment that identify private-use purposes for which the individual right can be asserted. See *post*, at 647.) That analysis is faulty. A purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass (except, apparently, in some courses on linguistics). If "bear arms" means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage ("for the purpose of self-defense" or "to make war against the King"). But if "bear arms" means, as the petitioners and the dissent think, the carrying of arms only for military purposes, one simply cannot add "for the purpose of killing game." The right "to carry arms in the militia for the purpose of killing game" is worthy of the Mad Hatter. Thus, these purposive qualifying phrases positively establish that "to bear arms" is not limited to military use.[11]

JUSTICE STEVENS places great weight on James Madison's inclusion of a conscientious-objector clause in his original draft of the Second Amendment: "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Creating the Bill of Rights 12 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit). He argues that this clause establishes that the drafters of the Second Amendment intended "bear Arms" to refer only

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[11] JUSTICE STEVENS contends, *post*, at 650, that since we assert that adding "against" to "bear arms" gives it a military meaning we must concede that adding a purposive qualifying phrase to "bear arms" can alter its meaning. But the difference is that we do not maintain that "against" *alters* the meaning of "bear arms" but merely that it *clarifies* which of various meanings (one of which is military) is intended. JUSTICE STEVENS, however, argues that "[t]he term 'bear arms' is a familiar idiom; when used unadorned by any additional words, its meaning is 'to serve as a soldier, do military service, fight.'" *Post*, at 646. He therefore must establish that adding a contradictory purposive phrase can *alter* a word's meaning.

to military service. See *post*, at 660–661. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.[12] In any case, what JUSTICE STEVENS would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes have been almost overwhelming." P. Brock, Pacifism in the United States 359 (1968); see M. Hirst, The Quakers in Peace and War 336–339 (1923); 3 T. Clarkson, Portraiture of Quakerism 103–104 (3d ed. 1807). The Pennsylvania Militia Act of 1757 exempted from service those "*scrupling the use of arms*"—a phrase that no one contends had an idiomatic meaning. See 5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders comm'rs 1898) (emphasis in original). Thus, the most natural interpretation of Madison's deleted text is that those opposed to carrying weapons for potential violent confrontation would not be "compelled to render military service," in which such carrying would be required.[13]

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[12] JUSTICE STEVENS finds support for his legislative history inference from the recorded views of one Antifederalist member of the House. *Post*, at 660, n. 25. "The claim that the best or most representative reading of the [language of the] amendments would conform to the understanding and concerns of [the Antifederalists] is . . . highly problematic." Rakove, The Second Amendment: The Highest Stage of Originalism, in Bogus 74, 81.

[13] The same applies to the conscientious-objector amendments proposed by Virginia and North Carolina, which said: "That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead." See Veit 19; 4 J. Eliot, The Debates in the Several State Constitutions on the Adoption

Finally, JUSTICE STEVENS suggests that "keep and bear Arms" was some sort of term of art, presumably akin to "hue and cry" or "cease and desist." (This suggestion usefully evades the problem that there is no evidence whatsoever to support a military reading of "keep arms.") JUSTICE STEVENS believes that the unitary meaning of "keep and bear Arms" is established by the Second Amendment's calling it a "right" (singular) rather than "rights" (plural). See *post*, at 651. There is nothing to this. State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular "right," and the First Amendment protects the "right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances." See, *e. g.*, Pa. Declaration of Rights §§ IX, XII, XVI, in 5 Thorpe 3083–3084; Ohio Const., Art. VIII, §§ 11, 19 (1802), in *id.*, at 2910–2911.[14] And even if "keep and bear Arms" were a unitary phrase, we find no evidence that it bore a military meaning. Although the phrase was not at all common (which would be unusual for a term of art), we have found instances of its use with a clearly nonmilitary connotation. In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm pri-

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of the Federal Constitution 243, 244 (2d ed. 1836) (reprinted 1941). Certainly their second use of the phrase ("bear arms in his stead") refers, by reason of context, to compulsory bearing of arms for military duty. But their first use of the phrase ("any person religiously scrupulous of bearing arms") assuredly did not refer to people whose God allowed them to bear arms for defense of themselves but not for defense of their country.

[14] Faced with this clear historical usage, JUSTICE STEVENS resorts to the bizarre argument that because the word "to" is not included before "bear" (whereas it is included before "petition" in the First Amendment), the unitary meaning of "'to keep and bear'" is established. *Post*, at 651, n. 13. We have never heard of the proposition that omitting repetition of the "to" causes two verbs with different meanings to become one. A promise "to support and to defend the Constitution of the United States" is not a whit different from a promise "to support and defend the Constitution of the United States."

vate citizens (not militia members) as "a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defence." 49 The London Magazine or Gentleman's Monthly Intelligencer 467 (1780). In response, another member of Parliament referred to "the right of bearing arms for personal defence," making clear that no special military meaning for "keep and bear arms" was intended in the discussion. *Id.*, at 467–468.[15]

c. Meaning of the Operative Clause. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States* v. *Cruikshank*, 92 U. S. 542, 553 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ."[16]

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. See J. Malcolm, To Keep and Bear Arms 31–53 (1994) (hereinafter Malcolm); L. Schwoerer, The Declaration of Rights, 1689, p. 76 (1981).

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[15] Cf. 21 Geo. II, ch. 34, §3, in 7 Eng. Stat. at Large 126 (1748) ("That the Prohibition contained . . . in this Act, of having, keeping, bearing, or wearing any Arms or Warlike Weapons . . . shall not extend . . . to any Officers or their Assistants, employed in the Execution of Justice . . . ").

[16] Contrary to JUSTICE STEVENS' wholly unsupported assertion, *post*, at 636, 652, there was no pre-existing right in English law "to use weapons for certain military purposes" or to use arms in an organized militia.

Under the auspices of the 1671 Game Act, for example, the Catholic Charles II had ordered general disarmaments of regions home to his Protestant enemies. See Malcolm 103–106. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed: "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. This right has long been understood to be the predecessor to our Second Amendment. See E. Dumbauld, The Bill of Rights and What It Means Today 51 (1957); W. Rawle, A View of the Constitution of the United States of America 122 (1825) (hereinafter Rawle). It was clearly an individual right, having nothing whatever to do with service in a militia. To be sure, it was an individual right not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament. See Schwoerer, To Hold and Bear Arms: The English Perspective, in Bogus 207, 218; but see 3 J. Story, Commentaries on the Constitution of the United States § 1858 (1833) (hereinafter Story) (contending that the "right to bear arms" is a "limitatio[n] upon the power of parliament" as well). But it was secured to them as individuals, according to "libertarian political principles," not as members of a fighting force. Schwoerer, Declaration of Rights, at 283; see also *id.*, at 78; G. Jellinek, The Declaration of the Rights of Man and of Citizens 49, and n. 7 (1901) (reprinted 1979).

By the time of the founding, the right to have arms had become fundamental for English subjects. See Malcolm 122–134. Blackstone, whose works, we have said, "constituted the preeminent authority on English law for the found-

ing generation," *Alden* v. *Maine*, 527 U. S. 706, 715 (1999), cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. See 1 Blackstone 136, 139–140 (1765). His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation," *id.*, at 139, and "the right of having and using arms for self-preservation and defence," *id.*, at 140; see also 3 *id.*, at 2–4 (1768). Other contemporary authorities concurred. See G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17–18, 27 (3d ed. 1782); 2 J. de Lolme, The Rise and Progress of the English Constitution 886–887 (1784) (A. Stephens ed. 1838); W. Blizard, Desultory Reflections on Police 59–60 (1785). Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence." A Journal of the Times: Mar. 17, New York Journal, Supp. 1, Apr. 13, 1769, in Boston Under Military Rule 79 (O. Dickerson ed. 1936) (reprinted 1970); see also, *e. g.*, Shippen, Boston Gazette, Jan. 30, 1769, in 1 The Writings of Samuel Adams 299 (H. Cushing ed. 1904) (reprinted 1968). They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the

description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury." 1 Blackstone's Commentaries 145–146, n. 42 (1803) (hereinafter Tucker's Blackstone). See also W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31–32 (1833).

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, *e. g.*, *United States* v. *Williams*, 553 U. S. 285 (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause.

The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State . . . ."

a. "Well-Regulated Militia." In *United States* v. *Miller*, 307 U. S. 174, 179 (1939), we explained that "the Militia comprised all males physically capable of acting in concert for the common defense." That definition comports with founding-era sources. See, *e. g.*, Webster ("The militia of a country are the able bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations"); The Federalist No. 46, pp. 329, 334 (B. Wright ed. 1961) (J. Madison) ("near half a million of citizens with arms in their hands"); Letter to Destutt de Tracy (Jan. 26, 1811), in The Portable Thomas

Jefferson 520, 524 (M. Peterson ed. 1975) ("the militia of the State, that is to say, of every man in it able to bear arms").

Petitioners take a seemingly narrower view of the militia, stating that "[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, § 8, cls. 15–16)." Brief for Petitioners 12. Although we agree with petitioners' interpretive assumption that "militia" means the same thing in Article I and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create ("to raise . . . Armies"; "to provide . . . a Navy," Art. I, § 8, cls. 12–13), the militia is assumed by Article I already to be *in existence*. Congress is given the power to "provide for calling forth the Militia," § 8, cl. 15; and the power not to create, but to "organiz[e]" it—and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence, *ibid.*, cl. 16. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. That is what Congress did in the first Militia Act, which specified that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." Act of May 8, 1792, 1 Stat. 271. To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.

Finally, the adjective "well-regulated" implies nothing more than the imposition of proper discipline and training. See Johnson 1619 ("Regulate": "To adjust by rule or method"); Rawle 121–122; cf. Va. Declaration of Rights § 13 (1776), in 7 Thorpe 3812, 3814 (referring to "a well-regulated militia, composed of the body of the people, trained to arms").

b. "Security of a Free State." The phrase "security of a free State" meant "security of a free polity," not security of each of the several States as the dissent below argued, see 478 F. 3d, at 405, and n. 10. Joseph Story wrote in his treatise on the Constitution that "the word 'state' is used in various senses [and in] its most enlarged sense it means the people composing a particular nation or community." 1 Story § 208; see also 3 *id.*, § 1890 (in reference to the Second Amendment's prefatory clause: "The militia is the natural defence of a free country"). It is true that the term "State" elsewhere in the Constitution refers to individual States, but the phrase "security of a free State" and close variations seem to have been terms of art in 18th-century political discourse, meaning a "'free country'" or free polity. See Volokh, "Necessary to the Security of a Free State," 83 Notre Dame L. Rev. 1, 5 (2007); see, *e. g.*, 4 Blackstone 151 (1769); Brutus Essay III (Nov. 15, 1787), in The Essential Antifederalist 251, 253 (W. Allen & G. Lloyd eds., 2d ed. 2002). Moreover, the other instances of "state" in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States—"each state," "several states," "any state," "that state," "particular states," "one state," "no state." And the presence of the term "foreign state" in Article I and Article III shows that the word "state" did not have a single meaning in the Constitution.

There are many reasons why the militia was thought to be "necessary to the security of a free State." See 3 Story § 1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large

standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. The Federalist No. 29, pp. 226, 227 (B. Wright ed. 1961). Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

3. Relationship Between Prefatory Clause and Operative Clause.

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. See, *e. g.*, Letters from The Federal Farmer III (Oct. 10, 1787), in 2 The Complete Anti-Federalist 234, 242 (H. Storing ed. 1981). John Smilie, for example, worried not only that Congress's "command of the militia" could be used to create a "select militia," or to have "no militia at all," but also, as a separate concern, that "[w]hen a select militia is formed; the people in general may be disarmed." 2 Documentary History of the Ratification of the Constitution 508–509 (M. Jensen ed. 1976) (hereinafter

Documentary Hist.). Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people. See, *e. g.*, A Pennsylvanian III (Feb. 20, 1788), in The Origin of the Second Amendment 275, 276 (D. Young ed., 2d ed. 2001) (hereinafter Young); White, To the Citizens of Virginia (Feb. 22, 1788), in *id.*, at 280, 281; A Citizen of America (Oct. 10, 1787), in *id.*, at 38, 40; Foreign Spectator, Remarks on the Amendments to the Federal Constitution, Nov. 7, 1788, in *id.*, at 556. It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. JUSTICE BREYER's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms, see *post*, at 714 (dissenting opinion), is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's *codification;* it was the *central component* of the right itself.

Besides ignoring the historical reality that the Second Amendment was not intended to lay down a "novel princip[le]" but rather codified a right "inherited from our English ancestors," *Robertson* v. *Baldwin*, 165 U. S. 275, 281 (1897), petitioners' interpretation does not even achieve the nar-

rower purpose that prompted codification of the right. If, as they believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia, see Brief for Petitioners 8—if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment's guarantee—it does not assure the existence of a "citizens' militia" as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force.[17] That is why the first Militia Act's requirement that only whites enroll caused States to amend their militia laws to exclude free blacks. See Siegel, The Federal Government's Power to Enact Color-Conscious Laws, 92 Nw. U. L. Rev. 477, 521–525 (1998). Thus, if petitioners are correct, the Second Amendment protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them. It guarantees a select militia of the sort the Stuart kings found useful, but not the people's militia that was the concern of the founding generation.

B

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and im-

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[17] Article I, §8, cl. 16, of the Constitution gives Congress the power

"[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

It could not be clearer that Congress's "organizing" power, unlike its "governing" power, can be invoked even for that part of the militia not "employed in the Service of the United States." JUSTICE STEVENS provides no support whatever for his contrary view, see *post*, at 654, n. 20. Both the Federalists and Antifederalists read the provision as it was written, to permit the creation of a "select" militia. See The Federalist No. 29, pp. 226, 227 (B. Wright ed. 1961); Centinel, Revived, No. XXIX, Philadelphia Independent Gazetteer, Sept. 9, 1789, in Young 711, 712.

mediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two of them—Pennsylvania and Vermont—clearly adopted individual rights unconnected to militia service. Pennsylvania's Declaration of Rights of 1776 said: "That the people have a right to bear arms *for the defence of themselves* and the state . . . ." § XIII, in 5 Thorpe 3082, 3083 (emphasis added). In 1777, Vermont adopted the identical provision, except for inconsequential differences in punctuation and capitalization. See Vt. Const., ch. 1, § XV, in 6 *id.*, at 3741.

North Carolina also codified a right to bear arms in 1776: "That the people have a right to bear arms, for the defence of the State . . . ." Declaration of Rights § XVII, in 5 *id.*, at 2787, 2788. This could plausibly be read to support only a right to bear arms in a militia—but that is a peculiar way to make the point in a constitution that elsewhere repeatedly mentions the militia explicitly. See N. C. Const., §§ XIV, XVIII, XXXV, in *id.*, at 2789, 2791, 2793. Many colonial statutes required individual arms bearing for public-safety reasons—such as the 1770 Georgia law that "for the security and *defence of this province* from internal dangers and insurrections" required those men who qualified for militia duty individually "to carry fire arms" "to places of public worship." 19 Colonial Records of the State of Georgia 137–139 (A. Candler ed. 1911 (pt. 1)) (emphasis added). That broad public-safety understanding was the connotation given to the North Carolina right by that State's Supreme Court in 1843. See *State* v. *Huntly*, 25 N. C. 418, 422–423.

The 1780 Massachusetts Constitution presented another variation on the theme: "The people have a right to keep and to bear arms for the common defence. . . . " Pt. First, Art. XVII, in 3 Thorpe 1888, 1892. Once again, if one gives narrow meaning to the phrase "common defence" this can be thought to limit the right to the bearing of arms in a

state-organized military force. But once again the State's highest court thought otherwise. Writing for the court in an 1825 libel case, Chief Justice Parker wrote: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction." *Commonwealth* v. *Blanding*, 20 Mass. 304, 313–314. The analogy makes no sense if firearms could not be used for any individual purpose at all. See also Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 244 (1983) (19th-century courts never read "common defence" to limit the use of weapons to militia service).

We therefore believe that the most likely reading of all four of these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes. Other States did not include rights to bear arms in their pre-1789 constitutions—although in Virginia a Second Amendment analogue was proposed (unsuccessfully) by Thomas Jefferson. (It read: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]."[18] 1 The Papers of Thomas Jefferson 344 (J. Boyd ed. 1950).)

Between 1789 and 1820, nine States adopted Second Amendment analogues. Four of them—Kentucky, Ohio, Indiana, and Missouri—referred to the right of the people to "bear arms in defence of themselves and the State." See n. 8, *supra*. Another three States—Mississippi, Connecticut, and Alabama—used the even more individualistic phrasing that each citizen has the "right to bear arms in defence of himself and the State." See *ibid.* Finally, two States—Tennessee and Maine—used the "common defence" language

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[18] JUSTICE STEVENS says that the drafters of the Virginia Declaration of Rights rejected this proposal and adopted "instead" a provision written by George Mason stressing the importance of the militia. See *post*, at 659, and n. 24. There is no evidence that the drafters regarded the Mason proposal as a substitute for the Jefferson proposal.

of Massachusetts. See Tenn. Const., Art. XI, §26 (1796), in 6 Thorpe 3414, 3424; Me. Const., Art. I, §16 (1819), in 3 *id.*, at 1646, 1648. That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right. And with one possible exception that we discuss in Part II–D–2, 19th-century courts and commentators interpreted these state constitutional provisions to protect an individual right to use arms for self-defense. See n. 9, *supra; Simpson* v. *State*, 5 Yer. 356, 360 (Tenn. 1833).

The historical narrative that petitioners must endorse would thus treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an overreading of the prefatory clause.

C

JUSTICE STEVENS relies on the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one. But even assuming that this legislative history is relevant, JUSTICE STEVENS flatly misreads the historical record.

It is true, as JUSTICE STEVENS says, that there was concern that the Federal Government would abolish the institution of the state militia. See *post*, at 655. That concern found expression, however, *not* in the various Second Amendment precursors proposed in the state conventions, but in separate structural provisions that would have given the States concurrent and seemingly non-pre-emptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so. See Veit 17, 20 (Virginia proposal); 4 J. Eliot, The Debates in the Several State

Conventions on the Adoption of the Federal Constitution 244, 245 (2d ed. 1836) (reprinted 1941) (North Carolina proposal); see also 2 Documentary Hist. 624 (Pennsylvania minority's proposal). The Second Amendment precursors, by contrast, referred to the individual English right already codified in two (and probably four) state constitutions. The Federalist-dominated first Congress chose to reject virtually all major structural revisions favored by the Antifederalists, including the proposed militia amendments. Rather, it adopted primarily the popular and uncontroversial (though, in the Federalists' view, unnecessary) individual-rights amendments. The Second Amendment right, protecting only individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia. See, *e. g.*, Centinel, Revived, No. XXIX, Philadelphia Independent Gazetteer, Sept. 9, 1789, in Young 711, 712.

JUSTICE STEVENS thinks it significant that the Virginia, New York, and North Carolina Second Amendment proposals were "embedded . . . within a group of principles that are distinctly military in meaning," such as statements about the danger of standing armies. *Post*, at 657. But so was the highly influential minority proposal in Pennsylvania, yet that proposal, with its reference to hunting, plainly referred to an individual right. See 2 Documentary Hist. 624. Other than that erroneous point, JUSTICE STEVENS has brought forward absolutely no evidence that those proposals conferred only a right to carry arms in a militia. By contrast, New Hampshire's proposal, the Pennsylvania minority's proposal, and Samuel Adams' proposal in Massachusetts unequivocally referred to individual rights, as did two state constitutional provisions at the time. See Veit 16, 17 (New Hampshire proposal); 6 Documentary Hist. 1452, 1453 (J. Kaminski & G. Saladino eds. 2000) (Samuel Adams' proposal). JUSTICE STEVENS' view thus relies on the proposition, unsupported by any evidence, that different people of the founding period

had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.

D

We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. Before proceeding, however, we take issue with JUSTICE STEVENS' equating of these sources with postenactment legislative history, a comparison that betrays a fundamental misunderstanding of a court's interpretive task. See *post*, at 662, n. 28. "'[L]egislative history,'" of course, refers to the preenactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. *Ibid.* "[P]ostenactment legislative history," *ibid.*, a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. As we will show, virtually all interpreters of the Second Amendment in the century after its enactment interpreted the Amendment as we do.

1. Postratification Commentary.

Three important founding-era legal scholars interpreted the Second Amendment in published writings. All three understood it to protect an individual right unconnected with militia service.

St. George Tucker's version of Blackstone's Commentaries, as we explained above, conceived of the Blackstonian arms right as necessary for self-defense. He equated that right, absent the religious and class-based restrictions, with the Second Amendment. See 2 Tucker's Blackstone 143. In Note D, entitled, "View of the Constitution of the United States," Tucker elaborated on the Second Amendment: "This may be considered as the true palladium of liberty . . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." 1 *id.*, at App. 300 (ellipsis in original). He believed that the English game laws had abridged the right by prohibiting "keeping a gun or other engine for the destruction of game." *Ibid.*; see also 2 *id.*, at 143, and nn. 40 and 41. He later grouped the right with some of the individual rights included in the First Amendment and said that if "a law be passed by congress, prohibiting" any of those rights, it would "be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused . . . ." 1 *id.*, at App. 357. It is unlikely that Tucker was referring to a person's being "accused" of violating a law making it a crime to bear arms in a state militia.[19]

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[19] JUSTICE STEVENS quotes some of Tucker's unpublished notes, which he claims show that Tucker had ambiguous views about the Second Amendment. See *post*, at 666, and n. 32. But it is clear from the notes that Tucker located the power of States to arm their militias in the *Tenth* Amendment, and that he cited the Second Amendment for the proposition that such armament could not run afoul of any power of the Federal Government (since the Amendment prohibits Congress from ordering disarmament). Nothing in the passage implies that the Second Amendment pertains only to the carrying of arms in the organized militia.

In 1825, William Rawle, a prominent lawyer who had been a member of the Pennsylvania Assembly that ratified the Bill of Rights, published an influential treatise, which analyzed the Second Amendment as follows:

> "The first [principle] is a declaration that a well regulated militia is necessary to the security of a free state; a proposition from which few will dissent. . . .
>
> "The corollary, from the first position is, that the right of the people to keep and bear arms shall not be infringed.
>
> "The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." Rawle 121–122.[20]

Like Tucker, Rawle regarded the English game laws as violating the right codified in the Second Amendment. See *id.*, at 122–123. Rawle clearly differentiated between the people's right to bear arms and their service in a militia: "In a people permitted and accustomed to bear arms, we have the rudiments of a militia, which properly consists of armed citizens, divided into military bands, and instructed at least in part, in the use of arms for the purposes of war." *Id.*, at 140. Rawle further said that the Second Amendment right ought not "be abused to the disturbance of the public peace," such as by assembling with other armed individuals "for an

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[20] Rawle, writing before our decision in *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833), believed that the Second Amendment could be applied against the States. Such a belief would of course be nonsensical on petitioners' view that it protected only a right to possess and carry arms when conscripted by the State itself into militia service.

unlawful purpose"—statements that make no sense if the right does not extend to *any* individual purpose. *Id.*, at 123.

Joseph Story published his famous Commentaries on the Constitution of the United States in 1833. JUSTICE STEVENS suggests that "[t]here is not so much as a whisper" in Story's explanation of the Second Amendment that favors the individual-rights view. *Post*, at 668. That is wrong. Story explained that the English Bill of Rights had also included a "right to bear arms," a right that, as we have discussed, had nothing to do with militia service. 3 Story § 1858. He then equated the English right with the Second Amendment:

> "§ 1891. A similar provision [to the Second Amendment] in favour of protestants (for to them it is confined) is to be found in the bill of rights of 1688, it being declared, 'that the subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law.' But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege." (Footnotes omitted.)

This comparison to the Declaration of Right would not make sense if the Second Amendment right was the right to use a gun in a militia, which was plainly not what the English right protected. As the Tennessee Supreme Court recognized 38 years after Story wrote his Commentaries, "[t]he passage from Story, shows clearly that this right was intended . . . and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights." *Andrews* v. *State*, 50 Tenn. 165, 183–184 (1871). Story's Commentaries also cite as support Tucker and Rawle, both of whom clearly viewed the right as unconnected to militia service. See 3 Story § 1890, n. 2, § 1891, n. 3. In addition, in a shorter 1840 work Story wrote: "One of the ordinary modes, by which

tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia." A Familiar Exposition of the Constitution of the United States § 450 (reprinted 1986).

Antislavery advocates routinely invoked the right to bear arms for self-defense. Joel Tiffany, for example, citing Blackstone's description of the right, wrote that "the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed." A Treatise on the Unconstitutionality of American Slavery 117–118 (1849); see also L. Spooner, The Unconstitutionality of Slavery 116 (1845) (right enables "personal defence"). In his famous Senate speech about the 1856 "Bleeding Kansas" conflict, Charles Sumner proclaimed:

> "The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defense, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached. And yet such is the madness of the hour, that, in defiance of the solemn guarantee, embodied in the Amendments to the Constitution, that 'the right of the people to keep and bear arms shall not be infringed,' the people of Kansas have been arraigned for keeping and bearing them, and the Senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed—of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment." The Crime Against Kansas, May 19–20, 1856, in American Speeches: Political Oratory From the Revolution to the Civil War 553, 606–607 (T. Widmer ed. 2006).

We have found only one early-19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary. "The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such [militia-related] purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it." B. Oliver, The Rights of an American Citizen 177 (1832).

2. Pre-Civil War Case Law.

The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service. In *Houston* v. *Moore*, 5 Wheat. 1, 24 (1820), this Court held that States have concurrent power over the militia, at least where not pre-empted by Congress. Agreeing in dissent that States could "organize, arm, and discipline" the militia in the absence of conflicting federal regulation, Justice Story said that the Second Amendment "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id.*, at 51–53. Of course, if the Amendment simply "protect[ed] the right of the people of each of the several States to maintain a well-regulated militia," *post*, at 637 (STEVENS, J., dissenting), it would have enormous and obvious bearing on the point. But the Court and Story derived the States' power over the militia from the nonexclusive nature of federal power, not from the Second Amendment, whose preamble merely "confirms and illustrates" the importance of the militia. Even clearer was Justice Baldwin. In the famous fugitive-slave case of *Johnson* v. *Tompkins*, 13 F. Cas. 840,

850, 852 (CC Pa. 1833), Baldwin, sitting as a Circuit Judge, cited both the Second Amendment and the Pennsylvania analogue for his conclusion that a citizen has "a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either."

Many early-19th century state cases indicated that the Second Amendment right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions. A Virginia case in 1824 holding that the Constitution did not extend to free blacks explained: "[N]umerous restrictions imposed on [blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms." *Aldridge* v. *Commonwealth*, 2 Va. Cas. 447, 449 (Gen. Ct.). The claim was obviously not that blacks were prevented from carrying guns in the militia.[21] See also *Waters* v. *State*, 1 Gill 302, 309 (Md.

[21] JUSTICE STEVENS suggests that this is not obvious because free blacks in Virginia had been required to muster without arms. See *post*, at 663, n. 29 (citing Siegel, The Federal Government's Power to Enact Color-Conscious Laws, 92 Nw. U. L. Rev. 477, 497 (1998)). But that could not have been the type of law referred to in *Aldridge*, because that practice had stopped 30 years earlier when blacks were excluded entirely from the militia by the first Militia Act. See Siegel, *supra*, at 498, n. 120. JUSTICE STEVENS further suggests that laws barring blacks from militia service could have been said to violate the "right to bear arms." But under JUSTICE STEVENS' reading of the Second Amendment (we think), the protected right is the right to carry arms to the extent one is enrolled in the militia, not the right *to be in the militia*. Perhaps JUSTICE STEVENS really does adopt the full-blown idiomatic meaning of "bear arms," in which case every man and woman in this country has a right "to be a soldier" or even "to wage war." In any case, it is clear to us that *Al-*

1843) (because free blacks were treated as a "dangerous population," "laws have been passed to prevent their migration into this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness"). An 1829 decision by the Supreme Court of Michigan said: "The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose." *United States* v. *Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940) (hereinafter Blume). It is not possible to read this as discussing anything other than an individual right unconnected to militia service. If it did have to do with militia service, the limitation upon it would not be any "unlawful or unjustifiable purpose," but any nonmilitary purpose whatsoever.

In *Nunn* v. *State*, 1 Ga. 243, 251 (1846), the Georgia Supreme Court construed the Second Amendment as protecting the "*natural* right of self-defence" and therefore struck down a ban on carrying pistols openly. Its opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right:

> "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary

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dridge's allusion to the existing Virginia "restriction" upon the right of free blacks "to bear arms" could only have referred to "laws prohibiting free blacks from keeping weapons," Siegel, *supra*, at 497–498.

> to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, reestablished by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*!" *Ibid.*

Likewise, in *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."

Those who believe that the Second Amendment preserves only a militia-centered right place great reliance on the Tennessee Supreme Court's 1840 decision in *Aymette* v. *State*, 21 Tenn. 154. The case does not stand for that broad proposition; in fact, the case does not mention the word "militia" at all, except in its quoting of the Second Amendment. *Aymette* held that the state constitutional guarantee of the right to "bear" arms did not prohibit the banning of concealed weapons. The opinion first recognized that both the state right and the federal right were descendents of the 1689 English right, but (erroneously, and contrary to virtually all other authorities) read that right to refer only to "protect[ion of] the public liberty" and "keep[ing] in awe those who are in power," *id.*, at 158. The court then adopted a sort of middle position, whereby citizens were permitted to carry arms openly, unconnected with any service in a formal militia, but were given the right to use them only for the military purpose of banding together to oppose tyranny. This odd reading of the right is, to be sure, not the one we adopt—but it is not petitioners' reading either. More importantly, seven years earlier the Tennessee Supreme Court

had treated the state constitutional provision as conferring a right "to all the free citizens of the State to keep and bear arms for their defence," *Simpson*, 5 Yer., at 360; and 21 years later the court held that the "keep" portion of the state constitutional right included the right to personal self-defense: "[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace." *Andrews*, 50 Tenn., at 178–179; see also *ibid.* (equating state provision with Second Amendment).

3. Post-Civil War Legislation.

In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. See generally S. Halbrook, Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876 (1998) (hereinafter Halbrook); Brief for Institute for Justice as *Amicus Curiae*. Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive.

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. A Report of the Commission of the Freedmen's Bureau in 1866 stated plainly: "[T]he civil law [of Kentucky] prohibits the colored man from bearing arms. . . . Their arms are taken from them by the civil

authorities. . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed*." H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236. A joint congressional Report decried:

> "[I]n some parts of [South Carolina,] armed parties are, without proper authority, engaged in seizing all firearms found in the hands of the freedmen. Such conduct is in plain and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.' The freedmen of South Carolina have shown by their peaceful and orderly conduct that they can safely be trusted with firearms, and they need them to kill game for subsistence, and to protect their crops from destruction by birds and animals." Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, p. 229 (1866) (Proposed Circular of Brigadier General R. Saxton).

The view expressed in these statements was widely reported and was apparently widely held. For example, an editorial in The Loyal Georgian (Augusta) on February 3, 1866, assured blacks that "[a]ll men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." Halbrook 19.

Congress enacted the Freedmen's Bureau Act on July 16, 1866. Section 14 stated:

> "[T]he right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery. . . . " 14 Stat. 176–177.

The understanding that the Second Amendment gave freed blacks the right to keep and bear arms was reflected in con-

gressional discussion of the bill, with even an opponent of it saying that the founding generation "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense." Cong. Globe, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis).

Similar discussion attended the passage of the Civil Rights Act of 1871 and the Fourteenth Amendment. For example, Representative Butler said of the Act: "Section eight is intended to enforce the well-known constitutional provision guaranteeing the right of the citizen to 'keep and bear arms,' and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same." H. R. Rep. No. 37, 41st Cong., 3d Sess., 7–8 (1871). With respect to the proposed Amendment, Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess., 1182 (1866). Representative Nye thought the Fourteenth Amendment unnecessary because "[a]s citizens of the United States [blacks] have equal right to protection, and to keep and bear arms for self-defense." *Id.*, at 1073.

It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.

4. Post-Civil War Commentators.

Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service. The most famous was the judge and professor Thomas Cooley, who wrote a massively popular 1868 Treatise on Constitutional Limitations. Concerning the Second Amendment it said:

> "Among the other defences to personal liberty should be mentioned the right of the people to keep and bear

> arms. . . . The alternative to a standing army is 'a well-regulated militia,' but this cannot exist unless the people are trained to bearing arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been very little occasion to discuss that subject by the courts." *Id.*, at 350.

That Cooley understood the right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms, is made even clearer in his 1880 work, General Principles of Constitutional Law. The Second Amendment, he said, "was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people." *Id.*, at 270. In a section entitled "The Right in General," he continued:

> "It might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it

implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order." *Id.*, at 271.

All other post-Civil War 19th-century sources we have found concurred with Cooley. One example from each decade will convey the general flavor:

"[The purpose of the Second Amendment is] to secure a well-armed militia. . . . But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms. . . . The clause is analogous to the one securing the freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libellous abuse, is protected." J. Pomeroy, An Introduction to the Constitutional Law of the United States §239, pp. 152–153 (1868) (hereinafter Pomeroy).

"As the Constitution of the United States, and the constitutions of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons, when not on a journey, or as travellers, from *wearing or carrying concealed weapons*, be constitutional. There has been a great difference of opinion on the question." 2 J. Kent, Commentaries on American Law *340, n. 2 (O. Holmes ed., 12th ed. 1873) (hereinafter Kent).

"Some general knowledge of firearms is important to the public welfare; because it would be impossible, in case of war, to organize promptly an efficient force of volunteers unless the people had some familiarity with weapons of war. The Constitution secures the right of the people to keep and bear arms. No doubt, a citizen who keeps a gun or pistol under judicious precautions, practises in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right. No doubt, a person whose residence or duties involve peculiar peril may keep a pistol for prudent self-defence." B. Abbott, Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land 333 (1880) (hereinafter Abbott).

"The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection to the person, it represents among all nations power coupled with the exercise of a certain jurisdiction. . . . [I]t was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed." J. Ordronaux, Constitutional Legislation in the United States 241–242 (1891).

E

We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment.

United States v. *Cruikshank*, 92 U. S. 542, in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government. The opinion explained that the right "is not a right granted by the Constitution [or] in any manner dependent upon that instrument for its existence. The second amendment . . . means no more

than that it shall not be infringed by Congress." *Id.*, at 553. States, we said, were free to restrict or protect the right under their police powers. The limited discussion of the Second Amendment in *Cruikshank* supports, if anything, the individual-rights interpretation. There was no claim in *Cruikshank* that the victims had been deprived of their right to carry arms in a militia; indeed, the Governor had disbanded the local militia unit the year before the mob's attack, see C. Lane, The Day Freedom Died 62 (2008). We described the right protected by the Second Amendment as "'bearing arms for a lawful purpose'"[22] and said that "the people [must] look for their protection against any violation by their fellow-citizens of the rights it recognizes" to the States' police power. 92 U. S., at 553. That discussion makes little sense if it is only a right to bear arms in a state militia.[23]

Presser v. *Illinois*, 116 U. S. 252 (1886), held that the right to keep and bear arms was not violated by a law that forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law." *Id.*, at 264–265. This does not refute the individual-rights interpretation of the Amendment; no one supporting that interpretation has contended that States may not ban such groups. JUSTICE STEVENS

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[22] JUSTICE STEVENS' accusation that this is "not accurate," *post*, at 673, is wrong. It is true it was the indictment that described the right as "bearing arms for a lawful purpose." But, in explicit reference to the right described in the indictment, the Court stated that "[t]he second amendment declares that it [*i. e.*, the right of bearing arms for a lawful purpose] shall not be infringed." 92 U. S., at 553.

[23] With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser* v. *Illinois*, 116 U. S. 252, 265 (1886), and *Miller* v. *Texas*, 153 U. S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

presses *Presser* into service to support his view that the right to bear arms is limited to service in the militia by joining *Presser*'s brief discussion of the Second Amendment with a later portion of the opinion making the seemingly relevant (to the Second Amendment) point that the plaintiff was not a member of the state militia. Unfortunately for JUSTICE STEVENS' argument, that later portion deals with the *Fourteenth Amendment;* it was the *Fourteenth Amendment* to which the plaintiff's nonmembership in the militia was relevant. Thus, JUSTICE STEVENS' statement that *Presser* "suggested that . . . nothing in the Constitution protected the use of arms outside the context of a militia," *post*, at 674–675, is simply wrong. *Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.

JUSTICE STEVENS places overwhelming reliance upon this Court's decision in *Miller*, 307 U. S. 174. "[H]undreds of judges," we are told, "have relied on the view of the Amendment we endorsed there," *post*, at 638, and "[e]ven if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself . . . would prevent most jurists from endorsing such a dramatic upheaval in the law," *post*, at 639. And what is, according to JUSTICE STEVENS, the holding of *Miller* that demands such obeisance? That the Second Amendment "protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons." *Post*, at 637.

Nothing so clearly demonstrates the weakness of JUSTICE STEVENS' case. *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a Second Amendment challenge two men's federal indictment for transporting an unregistered short-barreled

shotgun in interstate commerce, in violation of the National Firearms Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was *not* that the defendants were "bear[ing] arms" not "for . . . military purposes" but for "nonmilitary use," *post*, at 637. Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*." 307 U. S., at 178 (emphasis added). "Certainly," the Court continued, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Ibid.* Beyond that, the opinion provided no explanation of the content of the right.

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. JUSTICE STEVENS can say again and again that *Miller* did not "turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns," *post*, at 677, but the words of the opinion prove otherwise. The most JUSTICE STEVENS can plausibly claim for *Miller* is that it declined to decide the nature of the Second Amendment right, despite the Solicitor General's argument (made in the alternative) that the right was collective, see Brief for United States, O. T. 1938,

No. 696, pp. 4–5. *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.

It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment. JUSTICE STEVENS claims, *post*, at 676–677, that the opinion reached its conclusion "[a]fter reviewing many of the same sources that are discussed at greater length by the Court today." Not many, which was not entirely the Court's fault. The defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of the Second Amendment). See Frye, The Peculiar Story of *United States* v. *Miller*, 3 N. Y. U. J. L. & Liberty 48, 65–68 (2008). The Government's brief spent two pages discussing English legal sources, concluding "that at least the carrying of weapons without lawful occasion or excuse was always a crime" and that (because of the class-based restrictions and the prohibition on terrorizing people with dangerous or unusual weapons) "the early English law did not guarantee an unrestricted right to bear arms." Brief for United States, O. T. 1938, No. 696, at 9–11. It then went on to rely primarily on the discussion of the English right to bear arms in *Aymette* v. *State*, 21 Tenn. 154, for the proposition that the only uses of arms protected by the Second Amendment are those that relate to the militia, not self-defense. See Brief for United States, O. T. 1938, No. 696, at 12–18. The final section of the brief recognized that "some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property," and launched an alternative argument that "weapons which are commonly used by criminals," such as sawed-off shotguns, are not protected. See *id.*, at 18–21. The Government's *Miller* brief thus provided

scant discussion of the history of the Second Amendment—and the Court was presented with no counterdiscussion. As for the text of the Court's opinion itself, that discusses *none* of the history of the Second Amendment. It assumes from the prologue that the Amendment was designed to preserve the militia, 307 U. S., at 178 (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their members were expected to possess, *id.*, at 178–182. Not a word *(not a word)* about the history of the Second Amendment. This is the mighty rock upon which the dissent rests its case.[21]

We may as well consider at this point (for we will have to consider eventually) *what* types of weapons *Miller* permits. Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." 307 U. S., at 179. The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. "In the colonial

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[21] As for the "hundreds of judges," *post*, at 638, who have relied on the view of the Second Amendment JUSTICE STEVENS claims we endorsed in *Miller*: If so, they overread *Miller*. And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms. In any event, it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right.

and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." *State* v. *Kessler*, 289 Ore. 359, 368, 614 P. 2d 94, 98 (1980) (citing G. Neumann, Swords and Blades of the American Revolution 6–15, 252–254 (1973)). Indeed, that is precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right, see Part III, *infra*.[25]

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first

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[25] *Miller* was briefly mentioned in our decision in *Lewis* v. *United States*, 445 U. S. 55 (1980), an appeal from a conviction for being a felon in possession of a firearm. The challenge was based on the contention that the prior felony conviction had been unconstitutional. No Second Amendment claim was raised or briefed by any party. In the course of rejecting the asserted challenge, the Court commented gratuitously, in a footnote, that "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States* v. *Miller* . . . (the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia')." *Id.*, at 65–66, n. 8. The footnote then cites several Court of Appeals cases to the same effect. It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued.

held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, see *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), and it was not until after World War II that we held a law invalid under the Establishment Clause, see *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U. S. 203 (1948). Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). It is demonstrably not true that, as JUSTICE STEVENS claims, *post*, at 676, "for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial." For most of our history the question did not present itself.

III

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, *e. g.*, *Sheldon*, in 5 Blume 346; Rawle 123; Pomeroy 152–153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, *e. g.*, *State* v. *Chandler*, 5 La. Ann., at 489–490; *Nunn* v. *State*, 1 Ga., at 251; see generally 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws impos-

ing conditions and qualifications on the commercial sale of arms.[26]

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U. S., at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148–149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804); J. Dunlap, The New-York Justice 8 (1815); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 271–272 (1831); H. Stephen, Summary of the Criminal Law 48 (1840); E. Lewis, An Abridgment of the Criminal Law of the United States 64 (1847); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). See also *State* v. *Langford*, 10 N. C. 381, 383–384 (1824); *O'Neill* v. *State*, 16 Ala. 65, 67 (1849); *English* v. *State*, 35 Tex. 473, 476 (1871); *State* v. *Lanier*, 71 N. C. 288, 289 (1874).

It may be objected that if weapons that are most useful in military service—M–16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause

[26] We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

and the protected right cannot change our interpretation of the right.

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights,[27] banning from the home "the most preferred firearm in the nation to 'keep' and use for

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[27] JUSTICE BREYER correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. *Post*, at 687–688. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. See, *e. g.*, *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 602 (2008). In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality [*i. e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . "). If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

protection of one's home and family," 478 F. 3d, at 400, would fail constitutional muster.

Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down. In *Nunn* v. *State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). See 1 Ga., at 251. In *Andrews* v. *State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of long guns. *Ibid.* See also *State* v. *Reid*, 1 Ala. 612, 616–617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i. e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. The District argues that we should interpret this element of the statute to contain an exception for self-defense. See Brief for Petitioners 56–57. But we think that is precluded by the unequivocal text, and by the presence of certain other enumerated exceptions: "Except for law enforcement personnel . . . , each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." D. C. Code §7–2507.02. The nonexistence of a self-defense exception is also suggested by the D. C. Court of Appeals' statement that the statute forbids residents to use firearms to stop intruders, see *McIntosh* v. *Washington*, 395 A. 2d 744, 755–756 (1978).[28]

Apart from his challenge to the handgun ban and the trigger-lock requirement respondent asked the District Court to enjoin petitioners from enforcing the separate licensing requirement "in such a manner as to forbid the carrying of a firearm within one's home or possessed land without a license." App. 59a. The Court of Appeals did not invalidate the licensing requirement, but held only that the District "may not prevent [a handgun] from being moved throughout one's house." 478 F. 3d, at 400. It then ordered the District Court to enter summary judgment "consistent

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[28] *McIntosh* upheld the law against a claim that it violated the Equal Protection Clause by arbitrarily distinguishing between residences and businesses. See 395 A. 2d, at 755. One of the rational bases listed for that distinction was the legislative finding "that for each intruder stopped by a firearm there are four gun-related accidents within the home." *Ibid.* That tradeoff would not bear mention if the statute did not prevent stopping intruders by firearms.

with [respondent's] prayer for relief." *Id.*, at 401. Before this Court petitioners have stated that "if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified," by which they apparently mean if he is not a felon and is not insane. Brief for Petitioners 58. Respondent conceded at oral argument that he does not "have a problem with . . . licensing" and that the District's law is permissible so long as it is "not enforced in an arbitrary and capricious manner." Tr. of Oral Arg. 74–75. We therefore assume that petitioners' issuance of a license will satisfy respondent's prayer for relief and do not address the licensing requirement.

JUSTICE BREYER has devoted most of his separate dissent to the handgun ban. He says that, even assuming the Second Amendment is a personal guarantee of the right to bear arms, the District's prohibition is valid. He first tries to establish this by founding-era historical precedent, pointing to various restrictive laws in the colonial period. These demonstrate, in his view, that the District's law "imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted." *Post*, at 682. Of the laws he cites, only one offers even marginal support for his assertion. A 1783 Massachusetts law forbade the residents of Boston to "take into" or "receive into" "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building" loaded firearms, and permitted the seizure of any loaded firearms that "shall be found" there. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts p. 218. That statute's text and its prologue, which makes clear that the purpose of the prohibition was to eliminate the danger to firefighters posed by the "depositing of loaded Arms" in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law's

application in that case). In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home. The other laws JUSTICE BREYER cites are gunpowder-storage laws that he concedes did not clearly prohibit loaded weapons, but required only that excess gunpowder be kept in a special container or on the top floor of the home. *Post*, at 686. Nothing about those fire-safety laws undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.

JUSTICE BREYER points to other founding-era laws that he says "restricted the firing of guns within the city limits to at least some degree" in Boston, Philadelphia, and New York. *Post*, at 683 (citing Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America, 25 Law & Hist. Rev. 139, 162 (2007)). Those laws provide no support for the severe restriction in the present case. The New York law levied a fine of 20 shillings on anyone who fired a gun in certain places (including houses) on New Year's Eve and the first two days of January, and was aimed at preventing the "great Damages . . . frequently done on [those days] by persons going House to House, with Guns and other Fire Arms and being often intoxicated with Liquor." Ch. 1501, 5 Colonial Laws of New York 244–246 (1894). It is inconceivable that this law would have been enforced against a person exercising his right to self-defense on New Year's Day against such drunken hooligans. The Pennsylvania law to which JUSTICE BREYER refers levied a fine of five shillings on one who fired a gun or set off fireworks in Philadelphia without first obtaining a license from the Governor. See Act of Aug. 26, 1721, ch. CCXLV, § IV, in 3 Stat. at Large of Pa. 253–254 (1896). Given Justice Wilson's explanation

that the right to self-defense with arms was protected by the Pennsylvania Constitution, it is unlikely that this law (which in any event amounted to at most a licensing regime) would have been enforced against a person who used firearms for self-defense. JUSTICE BREYER cites a Rhode Island law that simply levied a 5-shilling fine on those who fired guns in *streets* and *taverns*, a law obviously inapplicable to this case. See An Act for preventing Mischief being done in the town of *Newport*, or in any other Town in this Government, 1731 Rhode Island Session Laws pp. 240–241. Finally, JUSTICE BREYER points to a Massachusetts law similar to the Pennsylvania law, prohibiting "discharg[ing] any Gun or Pistol charged with Shot or Ball in the Town of *Boston*." Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay p. 208. It is again implausible that this would have been enforced against a citizen acting in self-defense, particularly given its preambulatory reference to "the *indiscreet* firing of Guns." *Ibid.* (preamble) (emphasis added).

A broader point about the laws that JUSTICE BREYER cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties.[29] They are akin to modern penalties for minor public-safety infractions like speeding or jaywalking. And although such public-safety laws may not contain exceptions for self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a "Do Not Walk" sign in order to flee an attacker, or that the government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a

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[29]The Supreme Court of Pennsylvania described the amount of five shillings in a contract matter in 1792 as "nominal consideration." *Morris's Lessee* v. *Smith*, 4 Dall. 119, 120 (Pa. 1792). Many of the laws cited punished violation with fine in a similar amount; the 1783 Massachusetts gunpowder-storage law carried a somewhat larger fine of £10 (200 shillings) and forfeiture of the weapon.

5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place. See D. C. Code § 7–2507.06.

JUSTICE BREYER moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Post*, at 689–690. After an exhaustive discussion of the arguments for and against gun control, JUSTICE BREYER arrives at his interest-balanced answer: Because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted

them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) *(per curiam)*. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which JUSTICE BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

JUSTICE BREYER chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. See *post*, at 720–721. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds* v. *United States*, 98 U. S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.

* * *

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra*, at 626–627, and n. 26. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

We affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-

defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States* v. *Miller*, 307 U. S. 174 (1939), provide a clear answer to that question.

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major federal firearms law.[1] Sustaining an indictment under the Act, this Court held that, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Miller*, 307 U. S., at 178. The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both

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[1] There was some limited congressional activity earlier: A 10% federal excise tax on firearms was passed as part of the Revenue Act of 1918, 40 Stat. 1057, and in 1927 a statute was enacted prohibiting the shipment of handguns, revolvers, and other concealable weapons through the United States mails. Ch. 75, 44 Stat. 1059–1060 (hereinafter 1927 Act).

the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.

Since our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there;[2] we ourselves affirmed it in 1980. See *Lewis* v. *United States*, 445 U. S. 55, 65–66, n. 8 (1980).[3] No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate

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[2] Until the Fifth Circuit's decision in *United States* v. *Emerson*, 270 F. 3d 203 (2001), every Court of Appeals to consider the question had understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes. See, *e. g.*, *United States* v. *Haney*, 264 F. 3d 1161, 1164–1166 (CA10 2001); *United States* v. *Napier*, 233 F. 3d 394, 402–404 (CA6 2000); *Gillespie* v. *Indianapolis*, 185 F. 3d 693, 710–711 (CA7 1999); *United States* v. *Scanio*, No. 97–1584, 1998 WL 802060, *2 (CA2, Nov. 12, 1998) (unpublished opinion); *United States* v. *Wright*, 117 F. 3d 1265, 1271–1274 (CA11 1997); *United States* v. *Rybar*, 103 F. 3d 273, 285–286 (CA3 1996); *Hickman* v. *Block*, 81 F. 3d 98, 100–103 (CA9 1996); *United States* v. *Hale*, 978 F. 2d 1016, 1018–1020 (CA8 1992); *Thomas* v. *City Council of Portland*, 730 F. 2d 41, 42 (CA1 1984) *(per curiam)*; *United States* v. *Johnson*, 497 F. 2d 548, 550 (CA4 1974) *(per curiam)*; *United States* v. *Johnson*, 441 F. 2d 1134, 1136 (CA5 1971); see also *Sandidge* v. *United States*, 520 A. 2d 1057, 1058–1059 (DC App. 1987). And a number of courts have remained firm in their prior positions, even after considering *Emerson*. See, *e. g.*, *United States* v. *Lippman*, 369 F. 3d 1039, 1043–1045 (CA8 2004); *United States* v. *Parker*, 362 F. 3d 1279, 1282–1284 (CA10 2004); *United States* v. *Jackubowski*, 63 Fed. Appx. 959, 961 (CA7 2003) (unpublished opinion); *Silveira* v. *Lockyer*, 312 F. 3d 1052, 1060–1066 (CA9 2002); *United States* v. *Milheron*, 231 F. Supp. 2d 376, 378 (Me. 2002); *Bach* v. *Pataki*, 289 F. Supp. 2d 217, 224–226 (NDNY 2003); *United States* v. *Smith*, 56 M. J. 711, 716 (Air Force Ct. Crim. App. 2001).

[3] Our discussion in *Lewis* was brief but significant. Upholding a conviction for receipt of a firearm by a felon, we wrote: "These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States* v. *Miller*, 307 U. S. 174, 178 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia')." 445 U. S., at 65–66, n. 8.

civilian use or misuse of weapons. Indeed, a review of the drafting history of the Amendment demonstrates that its Framers *rejected* proposals that would have broadened its coverage to include such uses.

The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons. Unable to point to any such evidence, the Court stakes its holding on a strained and unpersuasive reading of the Amendment's text; significantly different provisions in the 1689 English Bill of Rights, and in various 19th-century State Constitutions; postenactment commentary that was available to the Court when it decided *Miller*; and, ultimately, a feeble attempt to distinguish *Miller* that places more emphasis on the Court's decisional process than on the reasoning in the opinion itself.

Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, see *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 636 (1974) (Stewart, J., dissenting), would prevent most jurists from endorsing such a dramatic upheaval in the law.[4] As Justice Cardozo observed years ago, the "labor of

[4] See *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986) ("*[Stare decisis]* permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting)"); *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 652 (1895) (White, J., dissenting) ("The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to

judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." The Nature of the Judicial Process 149 (1921).

In this dissent I shall first explain why our decision in *Miller* was faithful to the text of the Second Amendment and the purposes revealed in its drafting history. I shall then comment on the postratification history of the Amendment, which makes abundantly clear that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes.

I

The text of the Second Amendment is brief. It provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Three portions of that text merit special focus: the introductory language defining the Amendment's purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects.

"A well regulated Militia, being necessary to the security of a free State"

The preamble to the Second Amendment makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be "well regulated." In all three respects it is comparable to provisions in several State Decla-

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depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people").

rations of Rights that were adopted roughly contemporaneously with the Declaration of Independence.[5] Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies.[6] While

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[5] The Virginia Declaration of Rights ¶ 13 (1776) provided: "That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power." 1 B. Schwartz, The Bill of Rights 235 (1971) (hereinafter Schwartz).

Maryland's Declaration of Rights, Arts. XXV–XXVII (1776), provided: "That a well-regulated militia is the proper and natural defence of a free government"; "That standing armies are dangerous to liberty, and ought not to be raised or kept up, without consent of the Legislature"; "That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power." 1 Schwartz 282.

Delaware's Declaration of Rights §§ 18–20 (1776) provided: "That a well regulated militia is the proper, natural, and safe defence of a free government"; "That standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the Legislature"; "That in all cases and at all times the military ought to be under strict subordination to and governed by the civil power." 1 Schwartz 278.

Finally, New Hampshire's Bill of Rights, Arts. XXIV–XXVI (1783), read: "A well regulated militia is the proper, natural, and sure defence of a state"; "Standing armies are dangerous to liberty, and ought not to be raised or kept up without consent of the legislature"; "In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power." 1 Schwartz 378. It elsewhere provided: "No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent." *Id.*, at 377 (Art. XIII).

[6] The language of the Amendment's preamble also closely tracks the language of a number of contemporaneous state militia statutes, many of which began with nearly identical statements. Georgia's 1778 militia statute, for example, began, "[w]hereas a well ordered and disciplined Militia, is essentially necessary, to the Safety, peace and prosperity, of this State." Act of Nov. 15, 1778, 19 Colonial Records of the State of Georgia 103 (Can-

the need for state militias has not been a matter of significant public interest for almost two centuries, that fact should not obscure the contemporary concerns that animated the Framers.

The parallels between the Second Amendment and these state declarations, and the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. Article XIII of Pennsylvania's 1776 Declaration of Rights announced that "the people have a right to bear arms for the defence *of themselves* and the state," 1 Schwartz 266 (emphasis added); § 43 of the Declaration ensured that "[t]he inhabitants of this state shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed," *id.*, at 274. And Article XV of the 1777 Vermont Declaration of Rights guaranteed "[t]hat the people have a right to bear arms for the defence *of themselves* and the State." *Id.*, at 324 (emphasis added).

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dler ed. 1911 (pt. 2)). North Carolina's 1777 militia statute started with this language: "[w]hereas a well regulated Militia is absolutely necessary for the defending and securing the Liberties of a free State." N. C. Sess. Laws ch. 1, § I, p. 1. And Connecticut's 1782 "Acts and Laws Regulating the Militia" began, "[w]hereas the Defence and Security of all free States depends (under God) upon the Exertions of a well regulated Militia, and the Laws heretofore enacted have proved inadequate to the End designed." Conn. Acts and Laws p. 585 (hereinafter 1782 Conn. Acts).

These state militia statutes give content to the notion of a "well-regulated militia." They identify those persons who compose the State's militia; they create regiments, brigades, and divisions; they set forth command structures and provide for the appointment of officers; they describe how the militia will be assembled when necessary and provide for training; and they prescribe penalties for nonappearance, delinquency, and failure to keep the required weapons, ammunition, and other necessary equipment. The obligation of militia members to "keep" certain specified arms is detailed further, n. 12, *infra*, and accompanying text.

The contrast between those two declarations and the Second Amendment reinforces the clear statement of purpose announced in the Amendment's preamble. It confirms that the Framers' single-minded focus in crafting the constitutional guarantee "to keep and bear Arms" was on military uses of firearms, which they viewed in the context of service in state militias.

The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803).

The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment's operative provision and returning to the preamble merely "to ensure that our reading of the operative clause is consistent with the announced purpose." *Ante*, at 578. That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted. While the Court makes the novel suggestion that it need only find some "logical connection" between the preamble and the operative provision, it does acknowledge that a prefatory clause may resolve an ambiguity in the text. *Ante*, at 577.[7] Without

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[7] The sources the Court cites simply do not support the proposition that some "logical connection" between the two clauses is all that is required. The Dwarris treatise, for example, merely explains that "[t]he general purview of a statute is not . . . *necessarily* to be restrained by any words introductory to the enacting clauses." F. Dwarris, A General Treatise on Statutes 268 (P. Potter ed. 1871) (emphasis added). The treatise proceeds to caution that "the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet, if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it." *Id.*, at 269. Sutherland makes the same point. Explaining that "[i]n the United States preambles are not as important as they are in

identifying any language in the text that even mentions civilian uses of firearms, the Court proceeds to "find" its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court's approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.

"[T]he right of the people"

The centerpiece of the Court's textual argument is its insistence that the words "the people" as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments. According to the Court, in all three provisions—as well as the Constitution's preamble, § 2 of Article I, and the Tenth Amendment—"the term unambiguously refers to all members of the political community, not an unspecified subset." *Ante*, at 580. But the Court *itself* reads the Second Amendment to protect a "subset" significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to "law-abiding, responsible citizens," *ante*, at 635. But the class of persons protected by the First and Fourth Amendments is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting pronouncements.

England," the treatise notes that in the United States "the settled principle of law is that the preamble cannot control the enacting part of the statute *in cases where the enacting part is expressed in clear, unambiguous terms.*" 2A N. Singer, Sutherland on Statutory Construction § 47.04, p. 146 (rev. 5th ed. 1992) (emphasis added). Surely not even the Court believes that the Amendment's operative provision, which, though only 14 words in length, takes the Court the better part of 18 pages to parse, is perfectly "clear and unambiguous."

The Court also overlooks the significance of the way the Framers used the phrase "the people" in these constitutional provisions. In the First Amendment, no words define the class of individuals entitled to speak, to publish, or to worship; in that Amendment it is only the right peaceably to assemble, and to petition the Government for a redress of grievances, that is described as a right of "the people." These rights contemplate collective action. While the right peaceably to assemble protects the individual rights of those persons participating in the assembly, its concern is with action engaged in by members of a group, rather than any single individual. Likewise, although the act of petitioning the Government is a right that can be exercised by individuals, it is primarily collective in nature. For if they are to be effective, petitions must involve groups of individuals acting in concert.

Similarly, the words "the people" in the Second Amendment refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.

As used in the Fourth Amendment, "the people" describes the class of persons protected from unreasonable searches and seizures by Government officials. It is true that the Fourth Amendment describes a right that need not be exercised in any collective sense. But that observation does not settle the meaning of the phrase "the people" when used in the Second Amendment. For, as we have seen, the phrase means something quite different in the Petition and Assembly Clauses of the First Amendment. Although the abstract definition of the phrase "the people" could carry the same meaning in the Second Amendment as in the Fourth Amendment, the preamble of the Second Amendment suggests that the uses of the phrase in the First and Second Amendments

are the same in referring to a collective activity. By way of contrast, the Fourth Amendment describes a right *against* governmental interference rather than an affirmative right *to* engage in protected conduct, and so refers to a right to protect a purely individual interest. As used in the Second Amendment, the words "the people" do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.

"[T]o keep and bear Arms"

Although the Court's discussion of these words treats them as two "phrases"—as if they read "to keep" and "to bear"—they describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities.

As a threshold matter, it is worth pausing to note an oddity in the Court's interpretation of "to keep and bear Arms." Unlike the Court of Appeals, the Court does not read that phrase to create a right to possess arms for "lawful, private purposes." *Parker* v. *District of Columbia*, 478 F. 3d 370, 382 (CADC 2007). Instead, the Court limits the Amendment's protection to the right "to possess and carry weapons in case of confrontation." *Ante*, at 592. No party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth. But although this novel limitation lacks support in the text of the Amendment, the Amendment's text *does* justify a different limitation: The "right to keep and bear Arms" protects only a right to possess and use firearms in connection with service in a state-organized militia.

The term "bear arms" is a familiar idiom; when used unadorned by any additional words, its meaning is "to serve as a soldier, do military service, fight." 1 Oxford English Dictionary 634 (2d ed. 1989). It is derived from the Latin *arma ferre*, which, translated literally, means "to bear *[ferre]* war equipment *[arma]*." Brief for Professors of

Linguistics and English as *Amici Curiae* 19. One 18th-century dictionary defined "arms" as "[w]eapons of offence, or armour of defence," 1 S. Johnson, A Dictionary of the English Language (1755), and another contemporaneous source explained that "[b]y *arms*, we understand those instruments of offence generally made use of in war; such as firearms, swords, &c. By *weapons*, we more particularly mean instruments of other kinds (exclusive of fire-arms), made use of as offensive, on special occasions." 1 J. Trusler, The Distinction Between Words Esteemed Synonymous in the English Language 37 (3d ed. 1794).[8] Had the Framers wished to expand the meaning of the phrase "bear arms" to encompass civilian possession and use, they could have done so by the addition of phrases such as "for the defense of themselves," as was done in the Pennsylvania and Vermont Declarations of Rights. The *unmodified* use of "bear arms," by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts.[9] The ab-

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[8] The Court's repeated citation to the dissenting opinion in *Muscarello* v. *United States*, 524 U. S. 125 (1998), *ante*, at 584, 586, as illuminating the meaning of "bear arms," borders on the risible. At issue in *Muscarello* was the proper construction of the word "carries" in 18 U. S. C. §924(c) (1994 ed.); the dissent in that case made passing reference to the Second Amendment only in the course of observing that both the Constitution and Black's Law Dictionary suggested that something more active than placement of a gun in a glove compartment might be meant by the phrase "'carries a firearm.'" 524 U. S., at 143.

[9] *Amici* professors of linguistics and English reviewed uses of the term "bear arms" in a compilation of books, pamphlets, and other sources disseminated in the period between the Declaration of Independence and the adoption of the Second Amendment. See Brief for Professors of Linguistics and English 23–25. *Amici* determined that of 115 texts that employed the term, all but five usages were in a clearly military context, and in four of the remaining five instances, further qualifying language conveyed a different meaning.

The Court allows that the phrase "bear Arms" did have as an idiomatic meaning, "'to serve as a soldier, do military service, fight,'" *ante*, at 586, but asserts that it "*unequivocally* bore that idiomatic meaning only when

sence of any reference to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble.[10] But when discussing these words, the Court simply ignores the preamble.

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followed by the preposition 'against,' which was in turn followed by the target of the hostilities," *ibid.* But contemporary sources make clear that the phrase "bear arms" was often used to convey a military meaning without those additional words. See, *e. g.*, To the Printer, Providence Gazette (May 27, 1775) ("By the common estimate of three millions of people in America, allowing one in five to bear arms, there will be found 600,000 fighting men"); Letter of Henry Laurens to the Mass. Council (Jan. 21, 1778), in Letters of Delegates to Congress 1774–1789, p. 622 (P. Smith ed. 1981) ("Congress were yesterday informed . . . that those Canadians who returned from Saratoga . . . had been compelled by Sir Guy Carleton to bear Arms"); Of the Manner of Making War Among the Indians of North-America, Connecticut Courant (May 23, 1785) ("The Indians begin to bear arms at the age of fifteen, and lay them aside when they arrive at the age of sixty. Some nations to the southward, I have been informed, do not continue their military exercises after they are fifty"); 28 Journals of the Continental Congress 1030 (G. Hunt ed. 1910) ("That hostages be mutually given as a security that the Convention troops and those received in exchange for them do not bear arms prior to the first day of May next"); H. R. J., 9th Cong., 1st Sess., 217 (Feb. 12, 1806) ("Whereas the commanders of British armed vessels have impressed many American seamen, and compelled them to bear arms on board said vessels, and assist in fighting their battles with nations in amity and peace with the United States"); H. R. J., 15th Cong., 2d Sess., 182–183 (Jan. 14, 1819) ("[The petitioners] state that they were residing in the British province of Canada, at the commencement of the late war, and that owing to their attachment to the United States, they refused to bear arms, when called upon by the British authorities . . . ").

[10] *Aymette* v. *State*, 21 Tenn. 154, 156 (1840), a case we cited in *Miller*, further confirms this reading of the phrase. In *Aymette*, the Tennessee Supreme Court construed the guarantee in Tennessee's 1834 Constitution that "'the free white men of this State, have a right to keep and bear arms for their common defence.'" Explaining that the provision was adopted with the same goals as the Federal Constitution's Second Amendment, the court wrote: "The words 'bear arms' . . . have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised

The Court argues that a "qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass." *Ante*, at 589. But this fundamentally fails to grasp the point. The stand-alone phrase "bear arms" most naturally conveys a military meaning *unless* the addition of a qualifying phrase signals that a different meaning is intended. When, as in this case, there is no such qualifier, the most natural meaning is the military one; and, in the absence of any qualifier, it is all the more appropriate to look to the preamble to confirm the natural meaning of the text.[11] The Court's objection is particularly puzzling in light of its own contention that the addition of the modifier "against" changes the meaning of "bear arms." Compare

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by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." 21 Tenn., at 158. The court elaborated: "[W]e may remark, that the phrase, '*bear arms*,' is used in the Kentucky Constitution as well as our own, and implies, as has already been suggested, their military use. . . . A man in the pursuit of deer, elk, and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms*, much less could it be said, that a private citizen *bears arms*, because he has a dirk or pistol concealed under his clothes, or a spear in a cane." *Id.*, at 161.

[11] As lucidly explained in the context of a statute mandating a sentencing enhancement for any person who "uses" a firearm during a crime of violence or drug trafficking crime:

"To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of 'using a firearm' is to speak of using it for its distinctive purpose, *i. e.*, as a weapon. To be sure, one can use a firearm in a number of ways, including as an article of exchange, just as one can 'use' a cane as a hall decoration—but that is not the ordinary meaning of 'using' the one or the other. The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily* is used." *Smith* v. *United States*, 508 U. S. 223, 242 (1993) (SCALIA, J., dissenting) (some internal quotation marks, footnotes, and citations omitted).

ante, at 584 (defining "bear arms" to mean "carrying [a weapon] for a particular purpose—confrontation"), with *ante*, at 586 ("The phrase 'bear Arms' also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: to serve as a soldier, do military service, fight or to wage war. But it unequivocally bore that idiomatic meaning only when followed by the preposition 'against'" (emphasis deleted; citations and some internal quotation marks omitted)).

The Amendment's use of the term "keep" in no way contradicts the military meaning conveyed by the phrase "bear arms" and the Amendment's preamble. To the contrary, a number of state militia laws in effect at the time of the Second Amendment's drafting used the term "keep" to describe the requirement that militia members store their arms at their homes, ready to be used for service when necessary. The Virginia military law, for example, ordered that "every one of the said officers, non-commissioned officers, and privates, shall constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer." Act . . . for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § III, p. 2 (emphasis added).[12] "[K]eep and bear arms" thus per-

[12] See also Act for the regulating, training, and arraying of the Militia, . . . of the State, 1781 N. J. Laws, ch. XIII, § 12, p. 43 ("And be it Enacted, That each Person enrolled as aforesaid, shall also *keep* at his Place of Abode one Pound of good merchantable Gunpowder and three Pounds of Ball sized to his Musket or Rifle" (emphasis added)); An Act for establishing a Militia, 1785 Del. Laws § 7, p. 59 ("*And be it enacted*, That every person between the ages of eighteen and fifty . . . shall at his own expence, provide himself . . . with a musket or firelock, with a bayonet, a cartouch box to contain twenty three cartridges, a priming wire, a brush and six flints, all in good order, on or before the first day of April next, under the penalty of forty shillings, and shall *keep* the same by him at all times, ready and fit for service, under the penalty of two shillings and six pence for each neglect or default thereof on every muster day" (second emphasis added)); 1782 Conn. Acts p. 590 ("And it shall be the duty of

fectly describes the responsibilities of a framing-era militia member.

This reading is confirmed by the fact that the clause protects only one right, rather than two. It does not describe a right "to keep . . . Arms" and a separate right "to bear . . . Arms." Rather, the single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary.[13] Different language surely would have been used to protect nonmilitary use and possession of weapons from regulation if such an intent had played any role in the drafting of the Amendment.

* * *

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms. Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence. The textual analysis offered by respondent and embraced by

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the Regional Quarter-Master to provide and *keep* a sufficient quantity of Ammunition and warlike stores for the use of their respective Regiments, to be *kept* in such Place or Places as shall be ordered by the Field Officers" (emphasis added)).

[13]The Court notes that the First Amendment protects two separate rights with the phrase "the 'right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances.'" *Ante*, at 591. But this only proves the point: In contrast to the language quoted by the Court, the Second Amendment does not protect a "right to keep *and to* bear arms," but rather a "right to keep and bear Arms." The State Constitutions cited by the Court are distinguishable on the same ground.

the Court falls far short of sustaining that heavy burden.[14] And the Court's emphatic reliance on the claim "that the Second Amendment . . . codified a *pre-existing* right," *ante*, at 592, is of course beside the point because the right to keep and bear arms for service in a state militia was also a pre-existing right.

Indeed, not a word in the constitutional text even arguably supports the Court's overwrought and novel description of the Second Amendment as "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Ante*, at 635.

II

The proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached, reflected in Article I's Militia Clauses and the Second Amendment, represent quintessential examples of the Framers' "split[ting] the atom of sovereignty."[15]

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[14] The Court's atomistic, word-by-word approach to construing the Amendment calls to mind the parable of the six blind men and the elephant, famously set in verse by John Godfrey Saxe. The Poems of John Godfrey Saxe 135–136 (1873). In the parable, each blind man approaches a single elephant; touching a different part of the elephant's body in isolation, each concludes that he has learned its true nature. One touches the animal's leg, and concludes that the elephant is like a tree; another touches the trunk and decides that the elephant is like a snake; and so on. Each of them, of course, has fundamentally failed to grasp the nature of the creature.

[15] By "'split[ting] the atom of sovereignty,'" the Framers created "'two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Saenz* v. *Roe*, 526 U. S. 489, 504, n. 17 (1999) (quoting *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring)).

Two themes relevant to our current interpretive task ran through the debates on the original Constitution. "On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States." *Perpich* v. *Department of Defense*, 496 U. S. 334, 340 (1990).[16] Governor Edmund Randolph, reporting on the Constitutional Convention to the Virginia Ratification Convention, explained: "With respect to a standing army, I believe there was not a member in the federal Convention, who did not feel indignation at such an institution." 3 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 401 (2d ed. 1863) (hereinafter Elliot). On the other hand, the Framers recognized the dangers inherent in relying on inadequately trained militia members "as the primary means of providing for the common defense," *Perpich*, 496 U. S., at 340; during the Revolutionary War, "[t]his force, though armed, was largely untrained, and its deficiencies were the subject of bitter complaint." Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 182 (1940).[17]

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[16] Indeed, this was one of the grievances voiced by the colonists: Paragraph 13 of the Declaration of Independence charged of King George, "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures."

[17] George Washington, writing to Congress on September 24, 1776, warned that for Congress "[t]o place any dependance upon Militia, is, assuredly, resting upon a broken staff." 6 Writings of George Washington 106, 110 (J. Fitzpatrick ed. 1932). Several years later he reiterated this view in another letter to Congress: "Regular Troops alone are equal to the exigencies of modern war, as well for defence as offence . . . . *No Militia* will ever acquire the habits necessary to resist a regular force. . . . The firmness requisite for the real business of fighting is only to be attained by a constant course of discipline and service." 20 *id.*, at 49, 49–50 (Sept. 15, 1780). And Alexander Hamilton argued this view in many debates. In 1787, he wrote:

"Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independ-

In order to respond to those twin concerns, a compromise was reached: Congress would be authorized to raise and support a national Army[18] and Navy, and also to organize, arm, discipline, and provide for the calling forth of "the Militia." U. S. Const., Art. I, §8, cls. 12–16. The President, at the same time, was empowered as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Art. II, §2. But, with respect to the militia, a significant reservation was made to the States: Although Congress would have the power to call forth,[19] organize, arm, and discipline the militia, as well as to govern "such Part of them as may be employed in the Service of the United States," the States respectively would retain the right to appoint the officers and to train the militia in accordance with the discipline prescribed by Congress. Art. I, §8, cl. 16.[20]

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ence. . . . War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice." The Federalist No. 25, p. 166 (C. Rossiter ed. 1961).

[18] "[B]ut no Appropriation of Money to that Use [raising and supporting Armies] shall be for a longer Term than two Years." U. S. Const., Art. I, §8, cl. 12.

[19] This "calling forth" power was only permitted in order for the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions." Art. I, §8, cl. 15.

[20] The Court assumes—incorrectly, in my view—that even when a state militia was not called into service, Congress would have had the power to exclude individuals from enlistment in that state militia. See *ante*, at 600. That assumption is not supported by the text of the Militia Clauses of the original Constitution, which confer upon Congress the power to "organiz[e], ar[m], and disciplin[e], the Militia," Art. I, §8, cl. 16, but not the power to say who will be members of a state militia. It is also flatly inconsistent with the Second Amendment. The States' power to create their own militias provides an easy answer to the Court's complaint that the right as I have described it is empty because it merely guarantees "citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them." *Ante*, at 600.

But the original Constitution's retention of the militia and its creation of divided authority over that body did not prove sufficient to allay fears about the dangers posed by a standing army. For it was perceived by some that Article I contained a significant gap: While it empowered Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia's *dis*armament. As George Mason argued during the debates in Virginia on the ratification of the original Constitution:

> "The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has the exclusive right to arm them." 3 Elliot 379.

This sentiment was echoed at a number of state ratification conventions; indeed, it was one of the primary objections to the original Constitution voiced by its opponents. The Antifederalists were ultimately unsuccessful in persuading state ratification conventions to condition their approval of the Constitution upon the eventual inclusion of any particular amendment. But a number of States did propose to the first Federal Congress amendments reflecting a desire to ensure that the institution of the militia would remain protected under the new Government. The proposed amendments sent by the States of Virginia, North Carolina, and New York focused on the importance of preserving the state militias and reiterated the dangers posed by standing armies. New Hampshire sent a proposal that differed significantly from the others; while also invoking the dangers of a standing army, it suggested that the Constitution should more broadly protect the use and possession of weapons, without tying such a guarantee expressly to the maintenance of the militia. The States of Maryland, Pennsylvania, and

Massachusetts sent no relevant proposed amendments to Congress, but in each of those States a minority of the delegates advocated related amendments. While the Maryland minority proposals were exclusively concerned with standing armies and conscientious objectors, the unsuccessful proposals in both Massachusetts and Pennsylvania would have protected a more broadly worded right, less clearly tied to service in a state militia. Faced with all of these options, it is telling that James Madison chose to craft the Second Amendment as he did.

The relevant proposals sent by the Virginia Ratifying Convention read as follows:

> "17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power." *Id.*, at 659.
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> "19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead." *Ibid.*

North Carolina adopted Virginia's proposals and sent them to Congress as its own, although it did not actually ratify the original Constitution until Congress had sent the proposed Bill of Rights to the States for ratification. 2 Schwartz 932–933; see The Complete Bill of Rights 182–183 (N. Cogan ed. 1997) (hereinafter Cogan).

New York produced a proposal with nearly identical language. It read:

> "That the people have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural and safe defence of a free State. . . . That standing Armies, in time of Peace, are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be kept under strict Subordination to the civil Power." 2 Schwartz 912.

Notably, each of these proposals used the phrase "keep and bear arms," which was eventually adopted by Madison. And each proposal embedded the phrase within a group of principles that are distinctly military in meaning.[21]

By contrast, New Hampshire's proposal, although it followed another proposed amendment that echoed the familiar concern about standing armies,[22] described the protection involved in more clearly personal terms. Its proposal read:

> "*Twelfth*, Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *Id.*, at 758, 761.

The proposals considered in the other three States, although ultimately rejected by their respective ratification

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[21] In addition to the cautionary references to standing armies and to the importance of civil authority over the military, each of the proposals contained a guarantee that closely resembled the language of what later became the Third Amendment. The 18th proposal from Virginia and North Carolina read: "That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the law directs." 3 Elliot 659. And New York's language read: "That in time of Peace no Soldier ought to be quartered in any House without the consent of the Owner, and in time of War only by the Civil Magistrate in such manner as the Laws may direct." 2 Schwartz 912.

[22] "*Tenth*, That no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress, nor shall Soldiers in Time of Peace be quartered upon private Houses with out the consent of the Owners." *Id.*, at 761.

conventions, are also relevant to our historical inquiry. First, the Maryland proposal, endorsed by a minority of the delegates and later circulated in pamphlet form, read:

> "4. That no standing army shall be kept up in time of peace, unless with the consent of two thirds of the members present of each branch of Congress.
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> . . . . . .
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> "10. That no person conscientiously scrupulous of bearing arms, in any case, shall be compelled personally to serve as a soldier." *Id.*, at 729, 735.

The rejected Pennsylvania proposal, which was later incorporated into a critique of the Constitution titled "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787," signed by a minority of the State's delegates (those who had voted against ratification of the Constitution), *id.*, at 628, 662, read:

> "7. That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to, and be governed by the civil powers." *Id.*, at 665.

Finally, after the delegates at the Massachusetts Ratification Convention had compiled a list of proposed amendments and alterations, a motion was made to add to the list the following language: "that the said Constitution be never construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Cogan 181. This motion, however, failed to achieve the necessary support, and the proposal was ex-

cluded from the list of amendments the State sent to Congress. 2 Schwartz 674–675.

Madison, charged with the task of assembling the proposals for amendments sent by the ratifying States, was the principal draftsman of the Second Amendment.[23] He had before him, or at the very least would have been aware of, all of these proposed formulations. In addition, Madison had been a member, some years earlier, of the committee tasked with drafting the Virginia Declaration of Rights. That committee considered a proposal by Thomas Jefferson that would have included within the Virginia Declaration the following language: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]." 1 Papers of Thomas Jefferson 363 (J. Boyd ed. 1950). But the committee rejected that language, adopting instead the provision drafted by George Mason.[24]

With all of these sources upon which to draw, it is strikingly significant that Madison's first draft omitted any mention of nonmilitary use or possession of weapons. Rather, his original draft repeated the essence of the two proposed amendments sent by Virginia, combining the substance of the two provisions succinctly into one, which read: "The

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[23] Madison explained in a letter to Richard Peters, Aug. 19, 1789, the paramount importance of preparing a list of amendments to placate those States that had ratified the Constitution in reliance on a commitment that amendments would follow: "In many States the [Constitution] was adopted under a tacit compact in [favor] of some subsequent provisions on this head. In [Virginia]. It would have been *certainly* rejected, had no assurances been given by its advocates that such provisions would be pursued. As an honest man *I feel* my self bound by this consideration." Creating the Bill of Rights 281, 282 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit).

[24] The adopted language, Virginia Declaration of Rights ¶ 13 (1776), read as follows: "That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power." 1 Schwartz 235.

right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Cogan 169.

Madison's decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When Madison prepared his first draft, and when that draft was debated and modified, it is reasonable to assume that all participants in the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.

Madison's initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. It confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military character of both. The objections voiced to the conscientious-objector clause only confirm the central meaning of the text. Although records of the debate in the Senate, which is where the conscientious-objector clause was removed, do not survive, the arguments raised in the House illuminate the perceived problems with the clause: Specifically, there was concern that Congress "can declare who are those religiously scrupulous, and prevent them from bearing arms."[25] The ultimate removal of the clause, therefore, only serves to confirm the purpose of the Amendment—to protect

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[25] Veit 182. This was the objection voiced by Elbridge Gerry, who went on to remark, in the next breath: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. . . . Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins." *Ibid.*

against congressional disarmament, by whatever means, of the States' militias.

The Court also contends that because "Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever," *ante*, at 590, the inclusion of a conscientious-objector clause in the original draft of the Amendment does not support the conclusion that the phrase "bear Arms" was military in meaning. But that claim cannot be squared with the record. In the proposals cited *supra*, at 656, both Virginia and North Carolina included the following language: "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent *to employ another to bear arms in his stead*" (emphasis added).[26] There is no plausible argument that the use of "bear arms" in those provisions was not unequivocally and exclusively military: The State simply does not compel its citizens to carry arms for the purpose of private "confrontation," *ante*, at 584, or for self-defense.

The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger. But state militias could not effectively check the prospect of a federal standing army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed.[27] As we explained in *Miller*: "With obvious purpose to assure the continuation and render possible the effectiveness of such

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[26] The failed Maryland proposals contained similar language. See *supra*, at 656.

[27] The Court suggests that this historical analysis casts the Second Amendment as an "odd outlier," *ante*, at 603; if by "outlier," the Court means that the Second Amendment was enacted in a unique and novel context, and responded to the particular challenges presented by the Framers' federalism experiment, I have no quarrel with the Court's characterization.

forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." 307 U. S., at 178. The evidence plainly refutes the claim that the Amendment was motivated by the Framers' fears that Congress might act to regulate any civilian uses of weapons. And even if the historical record were genuinely ambiguous, the burden would remain on the parties advocating a change in the law to introduce facts or arguments "'newly ascertained,'" *Vasquez*, 474 U. S., at 266; the Court is unable to identify any such facts or arguments.

III

Although it gives short shrift to the drafting history of the Second Amendment, the Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone's Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history.[28] All of these sources shed only indirect light on the question before us, and in any event offer little support for the Court's conclusion.[29]

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[28] The Court's fixation on the last two types of sources is particularly puzzling, since both have the same characteristics as postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining the intent of any provision's drafters. As has been explained:

"The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history'—which presumably means the *post*-enactment history of a statute's consideration and enactment—is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expression *not* of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law *previously enacted* means. . . . In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed." *Sullivan* v. *Finkelstein*, 496 U. S. 617, 631–632 (1990) (SCALIA, J., concurring in part).

[29] The Court stretches to derive additional support from scattered state-court cases primarily concerned with state constitutional provisions. See *ante*, at 611–614. To the extent that those state courts assumed that

The English Bill of Rights

The Court's reliance on Article VII of the 1689 English Bill of Rights—which, like most of the evidence offered by the Court today, was considered in *Miller*[30]—is misguided

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the Second Amendment was coterminous with their differently worded state constitutional arms provisions, their discussions were of course dicta. Moreover, the cases on which the Court relies were decided between 30 and 60 years after the ratification of the Second Amendment, and there is no indication that any of them engaged in a careful textual or historical analysis of the federal constitutional provision. Finally, the interpretation of the Second Amendment advanced in those cases is not as clear as the Court apparently believes. In *Aldridge* v. *Commonwealth*, 2 Va. Cas. 447 (Gen. Ct. 1824), for example, a Virginia court pointed to the restriction on free blacks' "right to bear arms" as evidence that the protections of the State and Federal Constitutions did not extend to free blacks. The Court asserts that "[t]he claim was obviously not that blacks were prevented from carrying guns in the militia." *Ante*, at 611. But it is not obvious at all. For in many States, including Virginia, free blacks during the colonial period were prohibited from carrying guns in the militia, instead being required to "muste[r] without arms"; they were later barred from serving in the militia altogether. See Siegel, The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry, 92 Nw. U. L. Rev. 477, 497–498, and n. 120 (1998). But my point is not that the *Aldridge* court endorsed my view of the Amendment—plainly it did not, as the premise of the relevant passage was that the Second Amendment applied to the States. Rather, my point is simply that the court could have understood the Second Amendment to protect a militia-focused right, and thus that its passing mention of the right to bear arms provides scant support for the Court's position.

[30] The Government argued in its brief:

"[I]t would seem that the early English law did not guarantee an unrestricted right to bear arms. Such recognition as existed of a right in the people to keep and bear arms appears to have resulted from oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people. This right, however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense." Brief for United States in *United States* v. *Miller*, O. T. 1938, No. 696, pp. 11–12 (citations omitted). The Government then cited at length the Tennessee Supreme Court's opinion in *Aymette*, 21 Tenn. 154,

both because Article VII was enacted in response to different concerns from those that motivated the Framers of the Second Amendment, and because the guarantees of the two provisions were by no means coextensive. Moreover, the English text contained no preamble or other provision identifying a narrow, militia-related purpose.

The English Bill of Rights responded to abuses by the Stuart monarchs; among the grievances set forth in the Bill of Rights was that the King had violated the law "[b]y causing several good Subjects being Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law." L. Schwoerer, The Declaration of Rights, 1689, App. 1, p. 295 (1981). Article VII of the Bill of Rights was a response to that selective disarmament; it guaranteed that "the Subjects which are Protestants may have Armes for their defence Suitable to their condition and as allowed by Law." *Id.*, at 297. This grant did not establish a general right of all persons, or even of all Protestants, to possess weapons. Rather, the right was qualified in two distinct ways: First, it was restricted to those of adequate social and economic status ("suitable to their Condition"); second, it was only available subject to regulation by Parliament ("as allowed by Law").[31]

The Court may well be correct that the English Bill of Rights protected the right of *some* English subjects to use *some* arms for personal self-defense free from restrictions by the Crown (but not Parliament). But that right—adopted

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which further situated the English Bill of Rights in its historical context. See n. 10, *supra*.

[31] Moreover, it was the Crown, not Parliament, that was bound by the English provision; indeed, according to some prominent historians, Article VII is best understood not as announcing any individual right to unregulated firearm ownership (after all, such a reading would fly in the face of the text), but as an assertion of the concept of parliamentary supremacy. See Brief for Jack N. Rakove et al. as *Amici Curiae* 6–9.

in a different historical and political context and framed in markedly different language—tells us little about the meaning of the Second Amendment.

Blackstone's Commentaries

The Court's reliance on Blackstone's Commentaries on the Laws of England is unpersuasive for the same reason as its reliance on the English Bill of Rights. Blackstone's invocation of "'the natural right of resistance and self-preservation,'" *ante*, at 594, and "'the right of having and using arms for self-preservation and defence,'" *ibid.*, referred specifically to Article VII in the English Bill of Rights. The excerpt from Blackstone offered by the Court, therefore, is, like Article VII itself, of limited use in interpreting the very differently worded, and differently historically situated, Second Amendment.

What *is* important about Blackstone is the instruction he provided on reading the sort of text before us today. Blackstone described an interpretive approach that gave far more weight to preambles than the Court allows. Counseling that "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable," Blackstone explained: "If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus, the proeme, or preamble, is often called in to help the construction of an act of parliament." 1 Commentaries on the Laws of England 59–60 (1765). In light of the Court's invocation of Blackstone as "'the preeminent authority on English law for the founding generation,'" *ante*, at 593–594 (quoting *Alden* v. *Maine*, 527 U. S. 706, 715 (1999)), its disregard for his guidance on matters of interpretation is striking.

Postenactment Commentary

The Court also excerpts, without any real analysis, commentary by a number of additional scholars, some near in time to the framing and others postdating it by close to a century. Those scholars are for the most part of limited relevance in construing the guarantee of the Second Amendment: Their views are not altogether clear,[32] they tended to collapse the Second Amendment with Article VII of the Eng-

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[32] For example, St. George Tucker, on whom the Court relies heavily, did not consistently adhere to the position that the Amendment was designed to protect the "Blackstonian" self-defense right, *ante*, at 606. In a series of unpublished lectures, Tucker suggested that the Amendment should be understood in the context of the compromise over military power represented by the original Constitution and the Second and Tenth Amendments:

"If a State chooses to incur the expense of putting arms into the Hands of its own Citizens for their defense, it would require no small ingenuity to prove that they have no right to do it, or that it could by any means contravene the Authority of the federal Govt. It may be alleged indeed that this might be done for the purpose of resisting the laws of the federal Government, or of shaking off the Union: to which the plainest answer seems to be, that whenever the States think proper to adopt either of these measures, they will not be with-held by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above-mentioned, would be subversive of every principle of Freedom in our Government; of which the first Congress appears to have been sensible by proposing an Amendment to the Constitution, which has since been ratified and has become part of it, viz., 'That a well regulated militia being necessary to the Security of a free State, the right of the people to keep & bear arms shall not be infringed.' To this we may add that this power of arming the militia, is not one of those prohibited to the States by the Constitution, and, consequently, is reserved to them under the twelfth Article of the ratified aments." 4 S. Tucker, Ten Notebooks of Law Lectures, 1790s, pp. 127–128, in Tucker-Coleman Papers (College of William and Mary).

See also Cornell, St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings, 47 Wm. & Mary L. Rev. 1123 (2006).

lish Bill of Rights, and they appear to have been unfamiliar with the drafting history of the Second Amendment.[33]

The most significant of these commentators was Joseph Story. Contrary to the Court's assertions, however, Story actually supports the view that the Amendment was designed to protect the right of each of the States to maintain a well-regulated militia. When Story used the term "palladium" in discussions of the Second Amendment, he merely echoed the concerns that animated the Framers of the Amendment and led to its adoption. An excerpt from his 1833 Commentaries on the Constitution of the United States—the same passage cited by the Court in *Miller*[34]—merits reproducing at some length:

> "The importance of [the Second Amendment] will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered as the

[33] The Court does acknowledge that at least one early commentator described the Second Amendment as creating a right conditioned upon service in a state militia. See *ante*, at 610 (citing B. Oliver, The Rights of an American Citizen (1832)). Apart from the fact that Oliver is the *only* commentator in the Court's exhaustive survey who appears to have inquired into the intent of the drafters of the Amendment, what is striking about the Court's discussion is its failure to refute Oliver's description of the meaning of the Amendment or the intent of its drafters; rather, the Court adverts to simple nose counting to dismiss his view.

[34] *Miller*, 307 U. S., at 182, n. 3.

> palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by the clause of our national bill of rights." 2 J. Story, Commentaries on the Constitution of the United States § 1897, pp. 620–621 (4th ed. 1873) (footnote omitted).

Story thus began by tying the significance of the Amendment directly to the paramount importance of the militia. He then invoked the fear that drove the Framers of the Second Amendment—specifically, the threat to liberty posed by a standing army. An important check on that danger, he suggested, was a "well-regulated militia," *id.*, at 621, for which he assumed that arms would have to be kept and, when necessary, borne. There is not so much as a whisper in the passage above that Story believed that the right secured by the Amendment bore any relation to private use or possession of weapons for activities like hunting or personal self-defense.

After extolling the virtues of the militia as a bulwark against tyranny, Story went on to decry the "growing indifference to any system of militia discipline." *Ibid.* When he wrote, "[h]ow it is practicable to keep the people duly armed without some organization it is difficult to see," *ibid.*, he un-

derscored the degree to which he viewed the arming of the people and the militia as indissolubly linked. Story warned that the "growing indifference" he perceived would "gradually undermine all the protection intended by this clause of our national bill of rights," *ibid.* In his view, the importance of the Amendment was directly related to the continuing vitality of an institution in the process of apparently becoming obsolete.

In an attempt to downplay the absence of any reference to nonmilitary uses of weapons in Story's commentary, the Court relies on the fact that Story characterized Article VII of the English Declaration of Rights as a "'similar provision,'" *ante*, at 608. The two provisions were indeed similar, in that both protected some uses of firearms. But Story's characterization in no way suggests that he believed that the provisions had the same scope. To the contrary, Story's exclusive focus on the militia in his discussion of the Second Amendment confirms his understanding of the right protected by the Second Amendment as limited to military uses of arms.

Story's writings as a Justice of this Court, to the extent that they shed light on this question, only confirm that Justice Story did not view the Amendment as conferring upon individuals any "self-defense" right disconnected from service in a state militia. Justice Story dissented from the Court's decision in *Houston* v. *Moore*, 5 Wheat. 1, 24 (1820), which held that a state court "had a concurrent jurisdiction" with the federal courts "to try a militia man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent." *Id.*, at 32. Justice Story believed that Congress' power to provide for the organizing, arming, and disciplining of the militia was, when Congress acted, plenary; but he explained that in the absence of congressional action, "I am certainly not prepared to deny the legitimacy of such an exercise of [state] authority." *Id.*, at 52. As to the Second Amendment, he wrote that it "may

not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id.*, at 52–53. The Court contends that had Justice Story understood the Amendment to have a militia purpose, the Amendment would have had "enormous and obvious bearing on the point." *Ante*, at 610. But the Court has it quite backwards: If Story had believed that the purpose of the Amendment was to permit civilians to keep firearms for activities like personal self-defense, what "confirm[ation] and illustrat[ion]," *Houston*, 5 Wheat., at 53, could the Amendment possibly have provided for the point that States retained the power to organize, arm, and discipline their own militias?

Post-Civil War Legislative History

The Court suggests that by the post-Civil War period, the Second Amendment was understood to secure a right to firearm use and ownership for purely private purposes like personal self-defense. While it is true that some of the legislative history on which the Court relies supports that contention, see *ante*, at 614–616, such sources are entitled to limited, if any, weight. All of the statements the Court cites were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation.

What is more, much of the evidence the Court offers is decidedly less clear than its discussion allows. The Court notes: "Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms." *Ante*, at 614. The Court hastily concludes that "[n]eedless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia," *ibid.* But some of the claims of the

sort the Court cites may have been just that. In some Southern States, Reconstruction-era Republican governments created state militias in which both blacks and whites were permitted to serve. Because "[t]he decision to allow blacks to serve alongside whites meant that most southerners refused to join the new militia," the bodies were dubbed "'Negro militia[s].'" S. Cornell, A Well-Regulated Militia 177 (2006). The "arming of the Negro militias met with especially fierce resistance in South Carolina. . . . The sight of organized, armed freedmen incensed opponents of Reconstruction and led to an intensified campaign of Klan terror. Leading members of the Negro militia were beaten or lynched and their weapons stolen." *Id.*, at 176–177.

One particularly chilling account of Reconstruction-era Klan violence directed at a black militia member is recounted in the memoir of Louis F. Post, A "Carpetbagger" in South Carolina, 10 Journal of Negro History 10 (1925). Post describes the murder by local Klan members of Jim Williams, the captain of a "Negro militia company," *id.*, at 59, this way:

> "[A] cavalcade of sixty cowardly white men, completely disguised with face masks and body gowns, rode up one night in March, 1871, to the house of Captain Williams . . . in the wood [they] hanged [and shot] him . . . [and on his body they] then pinned a slip of paper inscribed, as I remember it, with these grim words: 'Jim Williams gone to his last muster.'" *Id.*, at 61.

In light of this evidence, it is quite possible that at least some of the statements on which the Court relies actually did mean to refer to the disarmament of black militia members.

IV

The brilliance of the debates that resulted in the Second Amendment faded into oblivion during the ensuing years, for the concerns about Article I's Militia Clauses that generated such pitched debate during the ratification process and led to the adoption of the Second Amendment were short lived.

In 1792, the year after the Amendment was ratified, Congress passed a statute that purported to establish "an Uniform Militia throughout the United States." 1 Stat. 271. The statute commanded every able-bodied white male citizen between the ages of 18 and 45 to be enrolled therein and to "provide himself with a good musket or firelock" and other specified weaponry.[35] *Ibid.* The statute is significant, for it confirmed the way those in the founding generation viewed firearm ownership: as a duty linked to military service. The statute they enacted, however, "was virtually ignored for more than a century," and was finally repealed in 1901. See *Perpich*, 496 U. S., at 341.

The postratification history of the Second Amendment is strikingly similar. The Amendment played little role in any legislative debate about the civilian use of firearms for most of the 19th century, and it made few appearances in the decisions of this Court. Two 19th-century cases, however, bear mentioning.

In *United States* v. *Cruikshank*, 92 U. S. 542 (1876), the Court sustained a challenge to respondents' convictions under the Enforcement Act of 1870 for conspiring to deprive any individual of "'any right or privilege granted or secured to him by the constitution or laws of the United States.'" *Id.*, at 548. The Court wrote, as to counts 2 and 10 of respondents' indictment:

> "The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent on

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[35] The additional specified weaponry included: "a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle and a quarter of a pound of powder." 1 Stat. 271.

> that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government." *Id.*, at 553.

The majority's assertion that the Court in *Cruikshank* "described the right protected by the Second Amendment as '"bearing arms for a lawful purpose,"'" *ante*, at 620 (quoting *Cruikshank*, 92 U. S., at 553), is not accurate. The *Cruikshank* Court explained that the defective *indictment* contained such language, but the Court did not itself describe the right, or endorse the indictment's description of the right.

Moreover, it is entirely possible that the basis for the indictment's counts 2 and 10, which charged respondents with depriving the victims of rights secured by the Second Amendment, was the prosecutor's belief that the victims—members of a group of citizens, mostly black but also white, who were rounded up by the sheriff, sworn in as a posse to defend the local courthouse, and attacked by a white mob—bore sufficient resemblance to members of a state militia that they were brought within the reach of the Second Amendment. See generally C. Lane, The Day Freedom Died: The Colfax Massacre, The Supreme Court, and the Betrayal of Reconstruction (2008).

Only one other 19th-century case in this Court, *Presser* v. *Illinois*, 116 U. S. 252 (1886), engaged in any significant discussion of the Second Amendment. The petitioner in *Presser* was convicted of violating a state statute that prohibited organizations other than the Illinois National Guard from associating together as military companies or parading with arms. Presser challenged his conviction, asserting, as relevant, that the statute violated both the Second and

the Fourteenth Amendments. With respect to the Second Amendment, the Court wrote:

> "We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States." *Id.*, at 264–265.

And in discussing the Fourteenth Amendment, the Court explained:

> "The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offence for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred." *Id.*, at 266.

Presser, therefore, both affirmed *Cruikshank*'s holding that the Second Amendment posed no obstacle to regulation by state governments, and suggested that in any event nothing in the Constitution protected the use of arms outside the

context of a militia "authorized by law" and organized by the State or Federal Government.[36]

In 1901, the President revitalized the militia by creating "'the National Guard of the several States,'" *Perpich*, 496 U. S., at 341, and nn. 9–10; meanwhile, the dominant understanding of the Second Amendment's inapplicability to private gun ownership continued well into the 20th century. The first two federal laws directly restricting civilian use and possession of firearms—the 1927 Act prohibiting mail delivery of "pistols, revolvers, and other firearms capable of being concealed on the person," ch. 75, 44 Stat. 1059, and the 1934 Act prohibiting the possession of sawed-off shotguns and machineguns—were enacted over minor Second Amendment objections dismissed by the vast majority of the legislators who participated in the debates.[37] Members of Congress clashed over the wisdom and efficacy of such laws as crime-control measures. But since the statutes did not in-

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[36] In another case the Court endorsed, albeit indirectly, the reading of *Miller* that has been well settled until today. In *Burton* v. *Sills*, 394 U. S. 812 (1969) *(per curiam)*, the Court dismissed for want of a substantial federal question an appeal from a decision of the New Jersey Supreme Court upholding, against a Second Amendment challenge, New Jersey's gun-control law. Although much of the analysis in the New Jersey court's opinion turned on the inapplicability of the Second Amendment as a constraint on the States, the court also quite correctly read *Miller* to hold that "Congress, though admittedly governed by the second amendment, may regulate interstate firearms so long as the regulation does not impair the maintenance of the active, organized militia of the states." *Burton* v. *Sills*, 53 N. J. 86, 99, 248 A. 2d 521, 527 (1968).

[37] The 1927 Act was enacted with no mention of the Second Amendment as a potential obstacle, although an earlier version of the bill had generated some limited objections on Second Amendment grounds, see 66 Cong. Rec. 725–735 (1924). And the 1934 Act featured just one colloquy, during the course of lengthy Committee debates, on whether the Second Amendment constrained Congress' ability to legislate in this sphere, see Hearings on H. R. 9066 before the House Committee on Ways and Means, 73d Cong., 2d Sess., 19 (1934).

fringe upon the military use or possession of weapons, for most legislators they did not even raise the specter of possible conflict with the Second Amendment.

Thus, for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial.[38] Indeed, the Second Amendment was not even mentioned in either full House of Congress during the legislative proceedings that led to the passage of the 1934 Act. Yet enforcement of that law produced the judicial decision that confirmed the status of the Amendment as limited in reach to military usage. After reviewing many of the same sources that are discussed at

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[38] The majority appears to suggest that even if the meaning of the Second Amendment has been considered settled by courts and legislatures for over two centuries, that settled meaning is overcome by the "reliance of millions of Americans" "upon the true meaning of the right to keep and bear arms." *Ante*, at 624, n. 24. Presumably by this the Court means that many Americans own guns for self-defense, recreation, and other lawful purposes, and object to government interference with their gun ownership. I do not dispute the correctness of this observation. But it is hard to see how Americans have "relied," in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question. Rather, gun owners have "relied" on the laws passed by democratically elected legislatures, which have generally adopted only limited gun-control measures.

Indeed, reliance interests surely cut the other way: Even apart from the reliance of judges and legislators who properly believed, until today, that the Second Amendment did not reach possession of firearms for purely private activities, "millions of Americans" have relied on the power of government to protect their safety and well-being, and that of their families. With respect to the case before us, the legislature of the District of Columbia has relied on its ability to act to "reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia," Firearms Control Regulations Act of 1975 (Council Act No. 1–142), Hearing and Disposition before the House Committee on the District of Columbia, 94th Cong., 2d Sess., on H. Con. Res. 694, Ser. No. 94–24, p. 25 (1976); see *post*, at 693–696 (BREYER, J., dissenting); so, too, have the residents of the District.

greater length by the Court today, the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have "some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U. S., at 178.

The key to that decision did not, as the Court belatedly suggests, *ante*, at 622–625, turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the Second Amendment were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?

Perhaps in recognition of the weakness of its attempt to distinguish *Miller*, the Court argues in the alternative that *Miller* should be discounted because of its decisional history. It is true that the appellees in *Miller* did not file a brief or make an appearance, although the court below had held that the relevant provision of the National Firearms Act violated the Second Amendment (albeit without any reasoned opinion). But, as our decision in *Marbury* v. *Madison*, 1 Cranch 137, in which only one side appeared and presented arguments, demonstrates, the absence of adversarial presentation alone is not a basis for refusing to accord *stare decisis* effect to a decision of this Court. See Bloch, *Marbury* Redux, in Arguing *Marbury* v. *Madison* 59, 63 (M. Tushnet ed. 2005). Of course, if it can be demonstrated that new evidence or arguments were genuinely not available to an earlier Court, that fact should be given special weight as we consider whether to overrule a prior case. But the Court does not make that claim, because it cannot. Although it is true that the drafting history of the Amendment was not

discussed in the Government's brief, see *ante*, at 623–624, it is certainly not the drafting history that the Court's decision today turns on. And those sources upon which the Court today relies most heavily *were* available to the *Miller* Court. The Government cited the English Bill of Rights and quoted a lengthy passage from *Aymette* v. *State*, 21 Tenn. 154 (1840), detailing the history leading to the English guarantee, Brief for United States in *United States* v. *Miller*, O. T. 1938, No. 696, pp. 12–13; it also cited Blackstone, *id.*, at 9, n. 2, Cooley, *id.*, at 12, 15, and Story, *id.*, at 15. The Court is reduced to critiquing the number of *pages* the Government devoted to exploring the English legal sources. Only two (in a brief 21 pages in length)! Would the Court be satisfied with four? Ten?

The Court is simply wrong when it intones that *Miller* contained "*not a word*" about the Amendment's history. *Ante*, at 624. The Court plainly looked to history to construe the term "Militia," and, on the best reading of *Miller*, the entire guarantee of the Second Amendment. After noting the original Constitution's grant of power to Congress and to the States over the militia, the Court explained:

> "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.
>
> "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.
>
> "The signification attributed to the term Militia appears from the debates in the Convention, the history

> and legislation of Colonies and States, and the writings of approved commentators." *Miller*, 307 U. S., at 178–179.

The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the *Miller* Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.

V

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights "enshrine[d]" in the Constitution. *Ante*, at 636. But the right the Court announces was not "enshrined" in the Second Amendment by the Framers; it is the product of today's law-changing decision. The majority's exegesis has utterly failed to establish that as a matter of text or history, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" is "elevate[d] above all other interests" by the Second Amendment. *Ante*, at 635.

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a "law-abiding, responsible citize[n]" the right to keep and use weapons in the home for self-defense is "off the table." *Ante*, at 636. Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home,

I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.[39]

I do not know whether today's decision will increase the labor of federal judges to the "breaking point" envisioned by Justice Cardozo, but it will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries.

The Court properly disclaims any interest in evaluating the wisdom of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice—the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun-control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

For these reasons, I respectfully dissent.

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[39] It was just a few years after the decision in *Miller* that Justice Frankfurter (by any measure a true judicial conservative) warned of the perils that would attend this Court's entry into the "political thicket" of legislative districting. *Colegrove* v. *Green*, 328 U. S. 549, 556 (1946) (plurality opinion). The equally controversial political thicket that the Court has decided to enter today is qualitatively different from the one that concerned Justice Frankfurter: While our entry into that thicket was justified because the political process was manifestly unable to solve the problem of unequal districts, no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control. What impact the Court's unjustified entry into *this* thicket will have on that ongoing debate—or indeed on the Court itself—is a matter that future historians will no doubt discuss at length. It is, however, clear to me that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

We must decide whether a District of Columbia law that prohibits the possession of handguns in the home violates the Second Amendment. The Court, relying upon its view that the Second Amendment seeks to protect a right of personal self-defense, holds that this law violates that Amendment. In my view, it does not.

I

The majority's conclusion is wrong for two independent reasons. The first reason is that set forth by JUSTICE STEVENS—namely, that the Second Amendment protects militia-related, not self-defense-related, interests. These two interests are sometimes intertwined. To assure 18th-century citizens that they could keep arms for militia purposes would necessarily have allowed them to keep arms that they could have used for self-defense as well. But self-defense alone, detached from any militia-related objective, is not the Amendment's concern.

The second independent reason is that the protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are—whether they do or do not include an independent interest in self-defense—the majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.

In respect to the first independent reason, I agree with JUSTICE STEVENS, and I join his opinion. In this opinion I shall focus upon the second reason. I shall show that the District's law is consistent with the Second Amendment even if that Amendment is interpreted as protecting a wholly separate interest in individual self-defense. That is so because the District's regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a

permissible legislative response to a serious, indeed life-threatening, problem.

Thus I here assume that one objective (but, as the majority concedes, *ante*, at 599, not the *primary* objective) of those who wrote the Second Amendment was to help assure citizens that they would have arms available for purposes of self-defense. Even so, a legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted. In these circumstances, the District's law falls within the zone that the Second Amendment leaves open to regulation by legislatures.

II

The Second Amendment says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In interpreting and applying this Amendment, I take as a starting point the following four propositions, based on our precedent and today's opinions, to which I believe the entire Court subscribes:

(1) The Amendment protects an "individual" right—*i. e.*, one that is separately possessed, and may be separately enforced, by each person on whom it is conferred. See, *e. g.*, *ante*, at 595 (opinion of the Court); *ante*, at 636 (STEVENS, J., dissenting).

(2) As evidenced by its preamble, the Amendment was adopted "[w]ith obvious purpose to assure the continuation

and render possible the effectiveness of [militia] forces." *United States* v. *Miller*, 307 U. S. 174, 178 (1939); see *ante*, at 599 (opinion of the Court); *ante*, at 637 (STEVENS, J., dissenting).

(3) The Amendment "must be interpreted and applied with that end in view." *Miller*, *supra*, at 178.

(4) The right protected by the Second Amendment is not absolute, but instead is subject to government regulation. See *Robertson* v. *Baldwin*, 165 U. S. 275, 281–282 (1897); *ante*, at 595, 626–627 (opinion of the Court).

My approach to this case, while involving the first three points, primarily concerns the fourth. I shall, as I said, assume with the majority that the Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense, at least to some degree. And I shall then ask whether the Amendment nevertheless permits the District handgun restriction at issue here.

Although I adopt for present purposes the majority's position that the Second Amendment embodies a general concern about self-defense, I shall not assume that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars. The majority, which presents evidence in favor of the former proposition, does not, because it cannot, convincingly show that the Second Amendment seeks to maintain the latter in pristine, unregulated form.

To the contrary, colonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the "right to keep and bear arms," whether embodied in Federal or State Constitutions, or the background common law. And those examples include substantial regulation of firearms in urban areas, including regulations that imposed obstacles to the use of firearms for the protection of the home.

Boston, Philadelphia, and New York City, the three largest cities in America during that period, all restricted the firing of guns within city limits to at least some degree. See

Churchill, Gun Regulation, the Police Power, and the Right To Keep Arms in Early America, 25 Law & Hist. Rev. 139, 162 (2007); Dept. of Commerce, Bureau of Census, C. Gibson, Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990 (1998) (Table 2), online at http://www.census.gov/population/www/documentation/twps0027/tab02.txt (all Internet materials as visited June 19, 2008, and available in Clerk of Court's case file). Boston in 1746 had a law prohibiting the "discharge" of "any Gun or Pistol charged with Shot or Ball in the Town" on penalty of 40 shillings, a law that was later revived in 1778. See Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay, p. 208; An Act for Reviving and Continuing Sundry Laws that are Expired, and Near Expiring, 1778 Mass. Sess. Laws, ch. V, pp. 193, 194. Philadelphia prohibited, on penalty of five shillings (or two days in jail if the fine were not paid), firing a gun or setting off fireworks in Philadelphia without a "governor's special license." See Act of Aug. 26, 1721, §IV, in 3 Stat. at Large of Pa. 253–254 (J. Mitchell & H. Flanders comm'rs 1896). And New York City banned, on penalty of a 20-shilling fine, the firing of guns (even in houses) for the three days surrounding New Year's Day. 5 Colonial Laws of New York, ch. 1501, pp. 244–246 (1894); see also An Act to Suppress the Disorderly Practice of Firing Guns, & c., on the Times Therein Mentioned (1774), in 8 Stat. at Large of Pa. 410–412 (1902) (similar law for all "inhabited parts" of Pennsylvania). See also An Act for preventing Mischief being done in the Town of *Newport*, or in any other Town in this Government, 1731 Rhode Island Session Laws pp. 240–241 (prohibiting, on penalty of five shillings for a first offense and more for subsequent offenses, the firing of "any Gun or Pistol . . . in the Streets of any of the Towns of this Government, or in any Tavern of the same, after dark, on any Night whatsoever").

Furthermore, several towns and cities (including Philadelphia, New York, and Boston) regulated, for fire-safety rea-

sons, the storage of gunpowder, a necessary component of an operational firearm. See Cornell & DeDino, A Well Regulated Right, 73 Ford. L. Rev. 487, 510–512 (2004). Boston's law in particular impacted the use of firearms in the home very much as the District's law does today. Boston's gunpowder law imposed a £10 fine upon "any Person" who "shall take into any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building, within the Town of *Boston*, any . . . Fire-Arm, loaded with, or having Gun-Powder." An Act in Addition to the several Acts already made for the prudent Storage of Gun-Powder within the Town of *Boston*, ch. XIII, 1783 Mass. Acts pp. 218–219; see also 1 S. Johnson, A Dictionary of the English Language 751 (4th ed. 1773) (defining "firearms" as "[a]rms which owe their efficacy to fire; guns"). Even assuming, as the majority does, see *ante*, at 631–632, that this law included an implicit self-defense exception, it would nevertheless have prevented a homeowner from keeping in his home a gun that he could immediately pick up and use against an intruder. Rather, the homeowner would have had to get the gunpowder and load it into the gun, an operation that would have taken a fair amount of time to perform. See Hicks, United States Military Shoulder Arms, 1795–1935, 1 Journal of Am. Military Hist. Foundation 23, 30 (1937) (experienced soldier could, with specially prepared cartridges as opposed to plain gunpowder and ball, load and fire musket 3-to-4 times per minute); *id.*, at 26–30 (describing the loading process); see also Grancsay, The Craft of the Early American Gunsmith, 6 Metropolitan Museum of Art Bulletin 54, 60 (1947) (noting that rifles were slower to load and fire than muskets).

Moreover, the law would, as a practical matter, have prohibited the carrying of loaded firearms anywhere in the city, unless the carrier had no plans to enter any building or was willing to unload or discard his weapons before going inside. And Massachusetts residents must have believed this kind of law compatible with the provision in the Massachusetts

Constitution that granted "[t]he people . . . a right to keep and to bear arms for the common defence"—a provision that the majority says was interpreted as "secur[ing] an individual right to bear arms for defensive purposes." Art. XVII (1780), in 3 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1888, 1892 (F. Thorpe ed. 1909) (hereinafter Thorpe); *ante*, at 602 (opinion of the Court).

The New York City law, which required that gunpowder in the home be stored in certain sorts of containers, and laws in certain Pennsylvania towns, which required that gunpowder be stored on the highest story of the home, could well have presented similar obstacles to in-home use of firearms. See Act of Apr. 13, 1784, ch. 28, 1784 N. Y. Laws p. 627; An Act for Erecting the Town of Carlisle, in the County of Cumberland, into a Borough, ch. XIV, § XLII, 1782 Pa. Laws p. 49; An Act for Erecting the Town of Reading, in the County of Berks, into a Borough, ch. LXXVI, § XLII, 1783 Pa. Laws p. 211. Although it is unclear whether these laws, like the Boston law, would have prohibited the storage of gunpowder inside a firearm, they would at the very least have made it difficult to reload the gun to fire a second shot unless the homeowner happened to be in the portion of the house where the extra gunpowder was required to be kept. See 7 United States Encyclopedia of History 1297 (P. Oehser ed. 1967) ("Until 1835 all small arms [were] single-shot weapons, requiring reloading by hand after every shot"). And Pennsylvania, like Massachusetts, had at the time one of the self-defense-guaranteeing state constitutional provisions on which the majority relies. See *ante*, at 601 (citing Pa. Declaration of Rights, § XIII (1776), in 5 Thorpe 3083).

The majority criticizes my citation of these colonial laws. See *ante*, at 631–634. But, as much as it tries, it cannot ignore their existence. I suppose it is possible that, as the majority suggests, see *ante*, at 631–633, they all in practice contained self-defense exceptions. But none of them expressly pro-

vided one, and the majority's assumption that such exceptions existed relies largely on the preambles to these acts—an interpretive methodology that it elsewhere roundly derides. Compare *ante*, at 631–632 (interpreting 18th-century statutes in light of their preambles), with *ante*, at 578, and n. 3 (contending that the operative language of an 18th-century enactment may extend beyond its preamble). And in any event, as I have shown, the gunpowder-storage laws would have *burdened* armed self-defense, even if they did not completely *prohibit* it.

This historical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry. That the District law impacts self-defense merely raises *questions* about the law's constitutionality. But to answer the questions that are raised (that is, to see whether the statute is unconstitutional) requires us to focus on practicalities, the statute's rationale, the problems that called it into being, its relation to those objectives—in a word, the details. There are no purely logical or conceptual answers to such questions. All of which to say that to raise a self-defense question is not to answer it.

III

I therefore begin by asking a process-based question: How is a court to determine whether a particular firearm regulation (here, the District's restriction on handguns) is consistent with the Second Amendment? What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect?

The question matters. The majority is wrong when it says that the District's law is unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Ante*, at 628. How could that be? It certainly would not be unconstitutional under, for example, a "rational-basis" standard, which requires a court to uphold regulation so long as it bears a "rational relation-

ship" to a "legitimate governmental purpose." *Heller* v. *Doe*, 509 U. S. 312, 320 (1993). The law at issue here, which in part seeks to prevent gun-related accidents, at least bears a "rational relationship" to that "legitimate" life-saving objective. And nothing in the three 19th-century state cases to which the majority turns for support mandates the conclusion that the present District law must fall. See *Andrews* v. *State*, 50 Tenn. 165, 177, 186–187, 192 (1871) (striking down, as violating a *state* constitutional provision adopted in 1870, a *statewide* ban on carrying a broad class of weapons, insofar as it applied to revolvers); *Nunn* v. *State*, 1 Ga. 243, 246, 250–251 (1846) (striking down similarly broad ban on openly carrying weapons, based on erroneous view that the Federal Second Amendment applied to the States); *State* v. *Reid*, 1 Ala. 612, 614–615, 622 (1840) (*upholding* a concealed-weapon ban against a *state* constitutional challenge). These cases were decided well (80, 55, and 49 years, respectively) after the framing; they neither claim nor provide any special insight into the intent of the Framers; they involve laws much less narrowly tailored than the one before us; and state cases in any event are not determinative of federal constitutional questions, see, *e. g.*, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 549 (1985) (citing *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816)).

Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." *Abrams* v. *Johnson*, 521 U. S. 74, 82 (1997); see Brief for Respondent 54–62. But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict-scrutiny standard would be far from clear. See *ante*, at 626–627.

Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. That is because almost every gun-control regulation will seek to advance (as the one here does) a "primary concern of every government—a concern for the safety and indeed the lives of its citizens." *United States* v. *Salerno*, 481 U. S. 739, 755 (1987). The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," see *id.*, at 750, 754, and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, see, *e. g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)* (First Amendment free speech rights); *Sherbert* v. *Verner*, 374 U. S. 398, 403 (1963) (First Amendment religious rights); *Brigham City* v. *Stuart*, 547 U. S. 398, 403–404 (2006) (Fourth Amendment protection of the home); *New York* v. *Quarles*, 467 U. S. 649, 655 (1984) (Fifth Amendment rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966)); *Salerno*, *supra*, at 755 (Eighth Amendment bail rights). Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of

proportion to the statute's salutary effects upon other important governmental interests. See *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 402 (2000) (BREYER, J., concurring). Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. See *ibid.* Contrary to the majority's unsupported suggestion that this sort of "proportionality" approach is unprecedented, see *ante*, at 634, the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases. See 528 U. S., at 403 (citing examples where the Court has taken such an approach); see also, *e. g.*, *Thompson* v. *Western States Medical Center*, 535 U. S. 357, 388 (2002) (BREYER, J., dissenting) (commercial speech); *Burdick* v. *Takushi*, 504 U. S. 428, 433 (1992) (election regulation); *Mathews* v. *Eldridge*, 424 U. S. 319, 339–349 (1976) (procedural due process); *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968) (government employee speech).

In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. See *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 195–196 (1997); see also *Nixon*, *supra*, at 403 (BREYER, J., concurring). Nonetheless, a court, not a legislature, must make the ultimate constitutional conclusion, exercising its "independent judicial judgment" in light of the whole record to determine whether a law exceeds constitutional boundaries. *Randall* v. *Sorrell*, 548 U. S. 230, 249 (2006) (opinion of BREYER, J.) (citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984)).

The above-described approach seems preferable to a more rigid approach here for a further reason. Experience as much as logic has led the Court to decide that in one area of constitutional law or another the interests are likely to prove

stronger on one side of a typical constitutional case than on the other. See, *e. g.*, *United States* v. *Virginia*, 518 U. S. 515, 531–534 (1996) (applying heightened scrutiny to gender-based classifications, based upon experience with prior cases); *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955) (applying rational-basis scrutiny to economic legislation, based upon experience with prior cases). Here, we have little prior experience. Courts that *do* have experience in these matters have uniformly taken an approach that treats empirically based legislative judgment with a degree of deference. See Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 687, 716–718 (2007) (describing hundreds of gun-law decisions issued in the last half century by Supreme Courts in 42 States, which courts with "surprisingly little variation" have adopted a standard more deferential than strict scrutiny). While these state cases obviously are not controlling, they are instructive. Cf., *e. g.*, *Bartkus* v. *Illinois*, 359 U. S. 121, 134 (1959) (looking to the "experience of state courts" as informative of a constitutional question). And they thus provide some comfort regarding the practical wisdom of following the approach that I believe our constitutional precedent would in any event suggest.

IV

The present suit involves challenges to three separate District firearm restrictions. The first requires a license from the District's chief of police in order to carry a "pistol," *i. e.*, a handgun, anywhere in the District. See D. C. Code §22–4504(a) (2001); see also §§22–4501(a), 22–4506. Because the District assures us that respondent could obtain such a license so long as he meets the statutory eligibility criteria, and because respondent concedes that those criteria are facially constitutional, I, like the majority, see no need to address the constitutionality of the licensing requirement. See *ante*, at 630–631.

The second District restriction requires that the lawful owner of a firearm keep his weapon "unloaded and disassembled or bound by a trigger lock or similar device" unless it is kept at his place of business or being used for lawful recreational purposes. See § 7–2507.02. The only dispute regarding this provision appears to be whether the Constitution requires an exception that would allow someone to render a firearm operational when necessary for self-defense (*i. e.*, that the firearm may be operated under circumstances where the common law would normally permit a self-defense justification in defense against a criminal charge). See *Parker* v. *District of Columbia*, 478 F. 3d 370, 401 (2007) (case below); *ante*, at 630 (opinion of the Court); Brief for Respondent 52–54. The District concedes that such an exception exists. See Brief for Petitioners 56–57. This Court has final authority (albeit not often used) to definitively interpret District law, which is, after all, simply a species of federal law. See, *e. g.*, *Whalen* v. *United States*, 445 U. S. 684, 687–688 (1980); see also *Griffin* v. *United States*, 336 U. S. 704, 716–718 (1949). And because I see nothing in the District law that would *preclude* the existence of a background common-law self-defense exception, I would avoid the constitutional question by interpreting the statute to include it. See *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring).

I am puzzled by the majority's unwillingness to adopt a similar approach. It readily reads unspoken self-defense exceptions into every colonial law, but it refuses to accept the District's concession that this law has one. Compare *ante*, at 631–633, with *ante*, at 630. The one District case it cites to support that refusal, *McIntosh* v. *Washington*, 395 A. 2d 744, 755–756 (1978), merely concludes that the District Legislature had a rational basis for applying the trigger-lock law in homes but not in places of business. Nowhere does that case say that the statute precludes a self-defense exception of the sort that I have just described. And even if it did,

we are not bound by a lower court's interpretation of federal law.

The third District restriction prohibits (in most cases) the registration of a handgun within the District. See § 7–2502.02(a)(4). Because registration is a prerequisite to firearm possession, see § 7–2502.01(a), the effect of this provision is generally to prevent people in the District from possessing handguns. In determining whether this regulation violates the Second Amendment, I shall ask how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests. The ultimate question is whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate. See *Nixon*, 528 U. S., at 402 (BREYER, J., concurring).

A

No one doubts the constitutional importance of the statute's basic objective, saving lives. See, *e. g.*, *Salerno*, 481 U. S., at 755. But there is considerable debate about whether the District's statute helps to achieve that objective. I begin by reviewing the statute's tendency to secure that objective from the perspective of (1) the legislature (namely, the Council of the District of Columbia (hereinafter Council)) that enacted the statute in 1976, and (2) a court that seeks to evaluate the Council's decision today.

1

First, consider the facts as the legislature saw them when it adopted the District statute. As stated by the local council committee that recommended its adoption, the major substantive goal of the District's handgun restriction is "to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia." Firearms Control Regulations Act of 1975 (Council Act No.

1–142), Hearing and Disposition before the House Committee on the District of Columbia, 94th Cong., 2d Sess., on H. Con. Res. 694, Ser. No. 94–24, p. 25 (1976) (hereinafter DC Rep.) (reproducing, *inter alia*, the Council Committee Report). The Committee concluded, on the basis of "extensive public hearings" and "lengthy research," that "[t]he easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 years." *Id.*, at 24, 25. It reported to the Council "startling statistics," *id.*, at 26, regarding gun-related crime, accidents, and deaths, focusing particularly on the relation between handguns and crime and the proliferation of handguns within the District. See *id.*, at 25–26.

The Committee informed the Council that guns were "responsible for 69 deaths in this country each day," for a total of "[a]pproximately 25,000 gun-deaths . . . each year," along with an additional 200,000 gun-related injuries. *Id.*, at 25. Three thousand of these deaths, the report stated, were accidental. *Ibid.* A quarter of the victims in those accidental deaths were children under the age of 14. *Ibid.* And according to the Committee, "[f]or every intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home." *Ibid.*

In respect to local crime, the Committee observed that there were 285 murders in the District during 1974—a record number. *Id.*, at 26. The Committee also stated that, "[c]ontrary to popular opinion on the subject, firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities." *Ibid.* Citing an article from the American Journal of Psychiatry, the Committee reported that "[m]ost murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion or intoxication, and where the killer and victim are acquainted." *Ibid.* "Twenty-five percent of these murders,"

the Committee informed the Council, "occur within families." *Ibid.*

The Committee Report furthermore presented statistics strongly correlating handguns with crime. Of the 285 murders in the District in 1974, 155 were committed with handguns. *Ibid.* This did not appear to be an aberration, as the report revealed that "handguns [had been] used in roughly 54% of all murders" (and 87% of murders of law enforcement officers) nationwide over the preceding several years. *Ibid.* Nor were handguns only linked to murders, as statistics showed that they were used in roughly 60% of robberies and 26% of assaults. *Ibid.* "A crime committed with a pistol," the Committee reported, "is 7 times more likely to be lethal than a crime committed with any other weapon." *Id.*, at 25. The Committee furthermore presented statistics regarding the availability of handguns in the United States, *ibid.*, and noted that they had "become easy for juveniles to obtain," even despite then-current District laws prohibiting juveniles from possessing them, *id.*, at 26.

In the Committee's view, the current District firearms laws were unable "to reduce the potentiality for gun-related violence," or to "cope with the problems of gun control in the District" more generally. *Ibid.* In the absence of adequate federal gun legislation, the Committee concluded, it "becomes necessary for local governments to act to protect their citizens, and certainly the District of Columbia as the only totally urban statelike jurisdiction should be strong in its approach." *Id.*, at 27. It recommended that the Council adopt a restriction on handgun registration to reflect "a legislative decision that, at this point in time and due to the gun-control tragedies and horrors enumerated previously" in the Committee Report, "pistols . . . are no longer justified in this jurisdiction." *Id.*, at 31; see also *ibid.* (handgun restriction "denotes a policy decision that handguns . . . have no legitimate use in the purely urban environment of the District").

The District's special focus on handguns thus reflects the fact that the Committee Report found them to have a particularly strong link to undesirable activities in the District's exclusively urban environment. See *id.*, at 25–26. The District did not seek to prohibit possession of other sorts of weapons deemed more suitable for an "urban area." See *id.*, at 25. Indeed, an original draft of the bill, and the original Committee recommendations, had sought to prohibit registration of shotguns as well as handguns, but the Council as a whole decided to narrow the prohibition. Compare *id.*, at 30 (describing early version of the bill), with D. C. Code § 7–2502.02).

2

Next, consider the facts as a court must consider them looking at the matter as of today. See, *e. g.*, *Turner*, 520 U. S., at 195 (discussing role of court as factfinder in a constitutional case). Petitioners, and their *amici*, have presented us with more recent statistics that tell much the same story that the Committee Report told 30 years ago. At the least, they present nothing that would permit us to second-guess the Council in respect to the numbers of gun crimes, injuries, and deaths, or the role of handguns.

From 1993 to 1997, there were 180,533 firearm-related deaths in the United States, an average of over 36,000 per year. Dept. of Justice, Bureau of Justice Statistics, M. Zawitz & K. Strom, Firearm Injury and Death From Crime, 1993–97, p. 2 (Oct. 2000), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/fidc9397.pdf (hereinafter Firearm Injury and Death From Crime). Fifty-one percent were suicides, 44% were homicides, 1% were legal interventions, 3% were unintentional accidents, and 1% were of undetermined causes. See *ibid.* Over that same period there were an additional 411,800 nonfatal firearm-related injuries treated in U. S. hospitals, an average of over 82,000 per year. *Ibid.* Of these, 62% resulted from assaults, 17% were unintentional, 6%

were suicide attempts, 1% were legal interventions, and 13% were of unknown causes. *Ibid.*

The statistics are particularly striking in respect to children and adolescents. In over one in every eight firearm-related deaths in 1997, the victim was someone under the age of 20. American Academy of Pediatrics, Firearm-Related Injuries Affecting the Pediatric Population, 105 Pediatrics 888 (2000) (hereinafter Firearm-Related Injuries). Firearm-related deaths account for 22.5% of all injury deaths between the ages of 1 and 19. *Ibid.* More male teenagers die from firearms than from all natural causes combined. Dresang, Gun Deaths in Rural and Urban Settings, 14 J. Am. Bd. Family Practice 107 (2001). Persons under 25 accounted for 47% of hospital-treated firearm injuries between June 1, 1992, and May 31, 1993. Firearm-Related Injuries 891.

Handguns are involved in a majority of firearm deaths and injuries in the United States. *Id.*, at 888. From 1993 to 1997, 81% of firearm-homicide victims were killed by handgun. Firearm Injury and Death From Crime 4; see also Dept. of Justice, Bureau of Justice Statistics, C. Perkins, Weapon Use and Violent Crime 8 (Sept. 2003) (Table 10), http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf (hereinafter Weapon Use and Violent Crime) (statistics indicating roughly the same rate for 1993–2001). In the same period, for the 41% of firearm injuries for which the weapon type is known, 82% of them were from handguns. Firearm Injury and Death from Crime 4. And among children under the age of 20, handguns account for approximately 70% of all unintentional firearm-related injuries and deaths. Firearm-Related Injuries 890. In particular, 70% of all firearm-related teenage suicides in 1996 involved a handgun. *Id.*, at 889; see also Zwerling, Lynch, Burmeister, & Goertz, The Choice of Weapons in Firearm Suicides in Iowa, 83 Am. J. Pub. Health 1630, 1631 (1993) (Table 1) (handguns used in 36.6% of all firearm suicides in Iowa from 1980–1984 and 43.8% from 1990–1991).

Handguns also appear to be a very popular weapon among criminals. In a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun. See Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Firearm Use by Offenders 3 (Nov. 2001), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/fuo.pdf; see also Weapon Use and Violent Crime 2 (Table 2) (statistics indicating that handguns were used in over 84% of nonlethal violent crimes involving firearms from 1993 to 2001). And handguns are not only popular tools for crime, but popular objects of it as well: the Federal Bureau of Investigation received on average over 274,000 reports of stolen guns for each year between 1985 and 1994, and almost 60% of stolen guns are handguns. Dept. of Justice, Bureau of Justice Statistics, M. Zawitz, Guns Used in Crime 3 (July 1995), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf. Department of Justice studies have concluded that stolen handguns in particular are an important source of weapons for both adult and juvenile offenders. *Ibid.*

Statistics further suggest that urban areas, such as the District, have different experiences with gun-related death, injury, and crime than do less densely populated rural areas. A disproportionate amount of violent and property crimes occur in urban areas, and urban criminals are more likely than other offenders to use a firearm during the commission of a violent crime. See Dept. of Justice, Bureau of Justice Statistics, D. Duhart, Urban, Suburban, and Rural Victimization, 1993–98, pp. 1, 9 (Oct. 2000), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/usrv98.pdf. Homicide appears to be a much greater issue in urban areas; from 1985 to 1993, for example, "half of all homicides occurred in 63 cities with 16% of the nation's population." Wintemute, The Future of Firearm Violence Prevention, 282 JAMA 475 (1999). One study concluded that although the overall rate of gun death between 1989 and 1999 was roughly the same in urban and

rural areas, the urban homicide rate was three times as high; even after adjusting for other variables, it was still twice as high. Branas, Nance, Elliott, Richmond, & Schwab, Urban-Rural Shifts in Intentional Firearm Death, 94 Am. J. Pub. Health 1750, 1752 (2004); see also *ibid.* (noting that rural areas appear to have a higher rate of firearm suicide). And a study of firearm injuries to children and adolescents in Pennsylvania between 1987 and 2000 showed an injury rate in urban counties 10 times higher than in nonurban counties. Nance et al., The Rural-Urban Continuum, 156 Archives of Pediatrics & Adolescent Medicine 781, 782 (2002).

Finally, the linkage of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas. "[S]tudies to date generally support the hypothesis that the greater number of rural gun deaths are from rifles or shotguns, whereas the greater number of urban gun deaths are from handguns." Dresang, *supra*, at 108. And the Pennsylvania study reached a similar conclusion with respect to firearm injuries—they are much more likely to be caused by handguns in urban areas than in rural areas. See Nance et al., *supra*, at 784.

3

Respondent and his many *amici* for the most part do not disagree about the *figures* set forth in the preceding subsection, but they do disagree strongly with the District's *predictive judgment* that a ban on handguns will help solve the crime and accident problems that those figures disclose. In particular, they disagree with the District Council's assessment that "freezing the pistol . . . population within the District," DC Rep., at 26, will reduce crime, accidents, and deaths related to guns. And they provide facts and figures designed to show that it has not done so in the past, and hence will not do so in the future.

First, they point out that, since the ban took effect, violent crime in the District has increased, not decreased. See

Brief for Criminologists et al. as *Amici Curiae* 4–8, 3a (hereinafter Criminologists' Brief); Brief for Congress of Racial Equality as *Amicus Curiae* 35–36; Brief for National Rifle Association et al. as *Amici Curiae* 28–30 (hereinafter NRA Brief). Indeed, a comparison with 49 other major cities reveals that the District's homicide rate is actually substantially *higher* relative to these other cities than it was before the handgun restriction went into effect. See Brief for Academics et al. as *Amici Curiae* 7–10 (hereinafter Academics' Brief); see also Criminologists' Brief 6–9, 3a–4a, 7a. Respondent's *amici* report similar results in comparing the District's homicide rates during that period to that of the neighboring States of Maryland and Virginia (neither of which restricts handguns to the same degree), and to the homicide rate of the Nation as a whole. See Academics' Brief 11–17; Criminologists' Brief 6a, 8a.

Second, respondent's *amici* point to a statistical analysis that regresses murder rates against the presence or absence of strict gun laws in 20 European nations. See Criminologists' Brief 23 (citing Kates & Mauser, Would Banning Firearms Reduce Murder and Suicide? 30 Harv. J. L. & Pub. Pol'y 649, 651–694 (2007)). That analysis concludes that strict gun laws are correlated with *more* murders, not fewer. See Criminologists' Brief 23; see also *id.*, at 25–28. They also cite domestic studies, based on data from various cities, States, and the Nation as a whole, suggesting that a reduction in the number of guns does not lead to a reduction in the amount of violent crime. See *id.*, at 17–20. They further argue that handgun bans do not reduce suicide rates, see *id.*, at 28–31, 9a, or rates of accidents, even those involving children, see App. to Brief for International Law Enforcement Educators and Trainers Association et al. as *Amici Curiae* App. 7–15 (hereinafter ILEETA Brief).

Third, they point to evidence indicating that firearm ownership does have a beneficial self-defense effect. Based on a 1993 survey, the authors of one study estimated that there

were 2.2-to-2.5 million defensive uses of guns (mostly brandishing, about a quarter involving the actual firing of a gun) annually. See Kleck & Gertz, Armed Resistance to Crime, 86 J. Crim. L. & C. 150, 164 (1995); see also ILEETA Brief App. 1–6 (summarizing studies regarding defensive uses of guns). Another study estimated that for a period of 12 months ending in 1994, there were 503,481 incidents in which a burglar found himself confronted by an armed homeowner, and that in 497,646 (98.8%) of them, the intruder was successfully scared away. See Ikeda, Dahlberg, Sacks, Mercy, & Powell, Estimating Intruder-Related Firearms Retrievals in U. S. Households, 12 Violence & Victims 363 (1997). A third study suggests that gun-armed victims are substantially less likely than non-gun-armed victims to be injured in resisting robbery or assault. Barnett & Kates, Under Fire, 45 Emory L. J. 1139, 1243–1244, n. 478 (1996). And additional evidence suggests that criminals are likely to be deterred from burglary and other crimes if they know the victim is likely to have a gun. See Kleck, Crime Control Through the Private Use of Armed Force, 35 Social Problems 1, 15 (1988) (reporting a substantial drop in the burglary rate in an Atlanta suburb that required heads of households to own guns); see also ILEETA Brief 17–18 (describing decrease in sexual assaults in Orlando when women were trained in the use of guns).

Fourth, respondent's *amici* argue that laws criminalizing gun possession are self-defeating, as evidence suggests that they will have the effect only of restricting law-abiding citizens, but not criminals, from acquiring guns. See, *e. g.*, Brief for President *Pro Tempore* of Senate of Pennsylvania as *Amicus Curiae* 35, 36, and n. 15. That effect, they argue, will be especially pronounced in the District, whose proximity to Virginia and Maryland will provide criminals with a steady supply of guns. See Brief for Heartland Institute as *Amicus Curiae* 20.

In the view of respondent's *amici*, this evidence shows that other remedies—such as *less* restriction on gun owner-

ship, or liberal authorization of law-abiding citizens to carry concealed weapons—better fit the problem. See, *e. g.*, Criminologists' Brief 35–37 (advocating easily obtainable gun licenses); Brief for Southeastern Legal Foundation, Inc., et al. as *Amici Curiae* 15 (hereinafter SLF Brief) (advocating "widespread gun ownership" as a deterrent to crime); see also J. Lott, More Guns, Less Crime (2d ed. 2000). They further suggest that at a minimum the District fails to show that its *remedy*, the gun ban, bears a reasonable relation to the crime and accident *problems* that the District seeks to solve. See, *e. g.*, Brief for Respondent 59–61.

These empirically based arguments may have proved strong enough to convince many legislatures, as a matter of legislative policy, not to adopt total handgun bans. But the question here is whether they are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them. And that they are not. For one thing, they can lead us more deeply into the uncertainties that surround any effort to reduce crime, but they cannot prove either that handgun possession diminishes crime or that handgun bans are ineffective. The statistics do show a soaring District crime rate. And the District's crime rate went up after the District adopted its handgun ban. But, as students of elementary logic know, *after it* does not mean *because of it*. What would the District's crime rate have looked like without the ban? Higher? Lower? The same? Experts differ; and we, as judges, cannot say.

What about the fact that foreign nations with strict gun laws have higher crime rates? Which is the cause and which the effect? The proposition that strict gun laws *cause* crime is harder to accept than the proposition that strict gun laws in part grow out of the fact that a nation already has a higher crime rate. And we are then left with the same question as before: What would have happened to crime without the gun laws—a question that respondent and his *amici* do not convincingly answer.

Further, suppose that respondent's *amici* are right when they say that householders' possession of loaded handguns help to frighten away intruders. On that assumption, one must still ask whether that benefit is worth the potential death-related cost. And that is a question without a directly provable answer.

Finally, consider the claim of respondent's *amici* that handgun bans *cannot* work; there are simply too many illegal guns already in existence for a ban on legal guns to make a difference. In a word, they claim that, given the urban sea of pre-existing legal guns, criminals can readily find arms regardless. Nonetheless, a legislature might respond, we want to make an effort to try to dry up that urban sea, drop by drop. And none of the studies can show that effort is not worthwhile.

In a word, the studies to which respondent's *amici* point raise policy-related questions. They succeed in proving that the District's predictive judgments are controversial. But they do not by themselves show that those judgments are incorrect; nor do they demonstrate a consensus, academic or otherwise, supporting that conclusion.

Thus, it is not surprising that the District and its *amici* support the District's handgun restriction with studies of their own. One in particular suggests that, statistically speaking, the District's law has indeed had positive life-saving effects. See Loftin, McDowall, Wiersema, & Cottey, Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia, 325 New England J. Med. 1615 (1991) (hereinafter Loftin study). Others suggest that firearm restrictions as a general matter reduce homicides, suicides, and accidents in the home. See, *e. g.*, Duggan, More Guns, More Crime, 109 J. Pol. Econ. 1086 (2001); Kellermann, Somes, Rivara, Lee, & Banton, Injuries and Deaths Due to Firearms in the Home, 45 J. Trauma: Injury, Infection & Critical Care 263 (1998); Miller, Azrael, & Hemenway, Household Firearm Ownership and Suicide Rates in

the United States, 13 Epidemiology 517 (2002). Still others suggest that the defensive uses of handguns are not as great in number as respondent's *amici* claim. See, *e. g.*, Brief for American Public Health Association et al. as *Amici Curiae* 17–19 (hereinafter APHA Brief) (citing studies).

Respondent and his *amici* reply to these responses; and in doing so, they seek to discredit as methodologically flawed the studies and evidence relied upon by the District. See, *e. g.*, Criminologists' Brief 9–17, 20–24; Brief for Association of American Physicians and Surgeons, Inc., as *Amicus Curiae* 12–18; SLF Brief 17–22; Britt, Kleck, & Bordua, A Reassessment of the D. C. Gun Law, 30 Law & Soc. Rev. 361 (1996) (criticizing the Loftin study). And, of course, the District's *amici* produce counterrejoinders, referring to articles that defend their studies. See, *e. g.*, APHA Brief 23, n. 5 (citing McDowall, Loftin, & Wiersema, Using Quasi-Experiments To Evaluate Firearm Laws, 30 Law & Soc. Rev. 381 (1996)).

The upshot is a set of studies and counterstudies that, at most, could leave a judge uncertain about the proper policy conclusion. But from respondent's perspective any such uncertainty is not good enough. That is because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact. And, given that constitutional allocation of decisionmaking responsibility, the empirical evidence presented here is sufficient to allow a judge to reach a firm *legal* conclusion.

In particular this Court, in First Amendment cases applying intermediate scrutiny, has said that our "sole obligation" in reviewing a legislature's "predictive judgments" is "to assure that, in formulating its judgments," the legislature "has drawn reasonable inferences based on substantial evidence." *Turner*, 520 U. S., at 195 (internal quotation marks omitted). And judges, looking at the evidence before us, should agree that the District Legislature's predictive judgments satisfy that legal standard. That is to say, the

District's judgment, while open to question, is nevertheless supported by "substantial evidence."

There is no cause here to depart from the standard set forth in *Turner*, for the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. See *Nixon*, 528 U. S., at 402 (BREYER, J., concurring). In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions. See *Los Angeles* v. *Alameda Books, Inc.*, 535 U. S. 425, 440 (2002) (plurality opinion) ("[W]e must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems"); cf. DC Rep., at 67 (statement of Rep. Gude) (describing District's law as "a decision made on the local level after extensive debate and deliberations"). Different localities may seek to solve similar problems in different ways, and a "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 52 (1986) (internal quotation marks omitted). "The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 575, n. 18 (1985) (Powell, J., dissenting) (citing The Federalist No. 17, p. 107 (J. Cooke ed. 1961) (A. Hamilton)). We owe that democratic process some substantial weight in the constitutional calculus.

For these reasons, I conclude that the District's statute properly seeks to further the sort of life-preserving and public-safety interests that the Court has called "compelling." *Salerno*, 481 U. S., at 750, 754.

B

I next assess the extent to which the District's law burdens the interests that the Second Amendment seeks to protect. Respondent and his *amici*, as well as the majority, suggest that those interests include: (1) the preservation of a "well regulated Militia"; (2) safeguarding the use of firearms for sporting purposes, *e. g.*, hunting and marksmanship; and (3) assuring the use of firearms for self-defense. For argument's sake, I shall consider all three of those interests here.

1

The District's statute burdens the Amendment's first and primary objective hardly at all. As previously noted, there is general agreement among the Members of the Court that the principal (if not the only) purpose of the Second Amendment is found in the Amendment's text: the preservation of a "well regulated Militia." See *supra*, at 682–683. What scant Court precedent there is on the Second Amendment teaches that the Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces" and "must be interpreted and applied with that end in view." *Miller*, 307 U. S., at 178. Where that end is implicated only minimally (or not at all), there is substantially less reason for constitutional concern. Compare *ibid.* ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument").

To begin with, the present case has nothing to do with *actual* military service. The question presented presumes that respondent is "*not* affiliated with any state-regulated militia." 552 U. S. 1035 (2007) (emphasis added). I am aware of no indication that the District either now or in the

recent past has called up its citizenry to serve in a militia, that it has any inkling of doing so anytime in the foreseeable future, or that this law must be construed to prevent the use of handguns during legitimate militia activities. Moreover, even if the District were to call up its militia, respondent would not be among the citizens whose service would be requested. The District does not consider him, at 66 years of age, to be a member of its militia. See D. C. Code § 49–401 (2001) (militia includes only male residents ages 18 to 45); App. to Pet. for Cert. 120a (indicating respondent's date of birth).

Nonetheless, as some *amici* claim, the statute might interfere with training in the use of weapons, training useful for military purposes. The 19th-century constitutional scholar, Thomas Cooley, wrote that the Second Amendment protects "learning to handle and use [arms] in a way that makes those who keep them ready for their efficient use" during militia service. General Principles of Constitutional Law 271 (1880); *ante*, at 618 (opinion of the Court); see also *ante*, at 618–619 (citing other scholars agreeing with Cooley on that point). And former military officers tell us that "private ownership of firearms makes for a more effective fighting force" because "[m]ilitary recruits with previous firearms experience and training are generally better marksmen, and accordingly, better soldiers." Brief for Retired Military Officers as *Amici Curiae* 1–2 (hereinafter Military Officers' Brief). An *amicus* brief filed by retired Army generals adds that a "well-regulated militia—whether *ad hoc* or as part of our organized military—depends on recruits who have familiarity and training with firearms—rifles, pistols, and shotguns." Brief for Major General John D. Altenburg, Jr., et al. as *Amici Curiae* 4 (hereinafter Generals' Brief). Both briefs point out the importance of handgun training. Military Officers' Brief 26–28; Generals' Brief 4. Handguns are used in military service, see Military Officers' Brief 26, and "civilians who are familiar with handgun marksmanship

and safety are much more likely to be able to safely and accurately fire a rifle or other firearm with minimal training upon entering military service," *id.*, at 28.

Regardless, to consider the military-training objective a modern counterpart to a similar militia-related colonial objective and to treat that objective as falling within the Amendment's primary purposes makes no difference here. That is because the District's law does not seriously affect military-training interests. The law permits residents to engage in activities that will increase their familiarity with firearms. They may register (and thus possess in their homes) weapons other than handguns, such as rifles and shotguns. See D. C. Code §§ 7–2502.01, 7–2502.02(a) (only weapons that cannot be registered are sawed-off shotguns, machineguns, short-barreled rifles, and pistols not registered before 1976); compare Generals' Brief 4 (listing "*rifles*, pistols, and *shotguns*" as useful military weapons (emphasis added)). And they may operate those weapons within the District "for lawful recreational purposes." § 7–2507.02; see also § 7–2502.01(b)(3) (nonresidents "participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction," may carry even weapons not registered in the District). These permissible recreations plainly include actually using and firing the weapons, as evidenced by a specific D. C. Code provision contemplating the existence of local firing ranges. See § 7–2507.03.

And while the District law prevents citizens from training with handguns *within the District*, the District consists of only 61.4 square miles of urban area. See Dept. of Commerce, Bureau of Census, United States: 2000 (pt. 1), p. 11 (2002) (Table 8). The adjacent States do permit the use of handguns for target practice, and those States are only a brief subway ride away. See Md. Crim. Law Code Ann. § 4–203(b)(4) (Lexis Supp. 2007) (general handgun restriction does not apply to "the wearing, carrying, or transporting by

a person of a handgun used in connection with," *inter alia*, "a target shoot, formal or informal target practice, sport shooting event, hunting, [or] a Department of Natural Resources-sponsored firearms and hunter safety class"); Va. Code Ann. § 18.2–287.4 (Lexis Supp. 2007) (general restriction on carrying certain loaded pistols in certain public areas does not apply "to any person actually engaged in lawful hunting or lawful recreational shooting activities at an established shooting range or shooting contest"); Washington Metropolitan Area Transit Authority, Metrorail System Map, online at http://www.wmata.com/metrorail/systemmap.cfm.

Of course, a subway rider must buy a ticket, and the ride takes time. It also costs money to store a pistol, say, at a target range, outside the District. But given the costs already associated with gun ownership and firearms training, I cannot say that a subway ticket and a short subway ride (and storage costs) create more than a minimal burden. Cf. *Crawford* v. *Marion County Election Bd.*, 553 U. S. 181, 238–239 (2008) (BREYER, J., dissenting) (acknowledging travel burdens on indigent persons in the context of voting where public transportation options were limited). Indeed, respondent and two of his coplaintiffs below may well use handguns outside the District on a regular basis, as their declarations indicate that they keep such weapons stored there. See App. to Pet. for Cert. 77a (respondent); see also *id.*, at 78a, 84a (coplaintiffs). I conclude that the District's law burdens the Second Amendment's primary objective little, or not at all.

2

The majority briefly suggests that the "right to keep and bear Arms" might encompass an interest in hunting. See, *e. g.*, *ante*, at 599. But in enacting the present provisions, the District sought to "take nothing away from sportsmen." DC Rep., at 33. And any inability of District residents to hunt near where they live has much to do with the jurisdiction's exclusively urban character and little to do with the

District's firearm laws. For reasons similar to those I discussed in the preceding subsection—that the District's law does not prohibit possession of rifles or shotguns, and the presence of opportunities for sporting activities in nearby States—I reach a similar conclusion, namely, that the District's law burdens any sports-related or hunting-related objectives that the Amendment may protect little, or not at all.

3

The District's law does prevent a resident from keeping a loaded handgun in his home. And it consequently makes it more difficult for the householder to use the handgun for self-defense in the home against intruders, such as burglars. As the Court of Appeals noted, statistics suggest that handguns are the most popular weapon for self-defense. See 478 F. 3d, at 400 (citing Kleck & Gertz, 86 J. Crim. L. & C., at 182–183). And there are some legitimate reasons why that would be the case: *Amici* suggest (with some empirical support) that handguns are easier to hold and control (particularly for persons with physical infirmities), easier to carry, easier to maneuver in enclosed spaces, and that a person using one will still have a hand free to dial 911. See ILEETA Brief 37–39; NRA Brief 32–33; see also *ante*, at 629. But see Brief for Petitioners 54–55 (citing sources preferring shotguns and rifles to handguns for purposes of self-defense). To that extent the law burdens to some degree an interest in self-defense that for present purposes I have assumed the Amendment seeks to further.

C

In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive, alternatives. Are there *other* potential measures that might similarly promote the same goals while imposing lesser restrictions? See *Nixon*, 528 U. S., at 402 (BREYER, J., concurring) ("existence of a clearly superior, less restrictive alter-

native" can be a factor in determining whether a law is constitutionally proportionate). Here I see none.

The reason there is no clearly superior, less restrictive alternative to the District's handgun ban is that the ban's very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that *any* handgun he sees is an *illegal* handgun. And there is no plausible way to achieve that objective other than to ban the guns.

It does not help respondent's case to describe the District's objective more generally as an "effort to diminish the dangers associated with guns." That is because the very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous. That they are easy to hold and control means that they are easier for children to use. See Brief for American Academy of Pediatrics et al. as *Amici Curiae* 19 ("[C]hildren as young as three are able to pull the trigger of most handguns"). That they are maneuverable and permit a free hand likely contributes to the fact that they are by far the firearm of choice for crimes such as rape and robbery. See Weapon Use and Violent Crime 2 (Table 2). That they are small and light makes them easy to steal, see *supra*, at 698, and concealable, cf. *ante*, at 626 (opinion of the Court) (suggesting that concealed-weapon bans are constitutional).

This symmetry suggests that any measure less restrictive in respect to the use of handguns for self-defense will, to that same extent, prove less effective in preventing the use of handguns for illicit purposes. If a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to commit suicide or engage in acts of domestic violence. See *supra*, at 697 (handguns prevalent in suicides); Brief for National Network to End Domestic Violence et al. as *Amici Curiae* 27 (handguns prevalent in domestic violence). If it is indeed the case, as the District believes, that the number of guns contributes to

the number of gun-related crimes, accidents, and deaths, then, although there may be less restrictive, *less effective* substitutes for an outright ban, there is no less restrictive *equivalent* of an outright ban.

Licensing restrictions would not similarly reduce the handgun population, and the District may reasonably fear that even if guns are initially restricted to law-abiding citizens, they might be stolen and thereby placed in the hands of criminals. See *supra*, at 698. Permitting certain types of handguns, but not others, would affect the commercial market for handguns, but not their availability. And requiring safety devices such as trigger locks, or imposing safe-storage requirements would interfere with any self-defense interest while simultaneously leaving operable weapons in the hands of owners (or others capable of acquiring the weapon and disabling the safety device) who might use them for domestic violence or other crimes.

The absence of equally effective alternatives to a complete prohibition finds support in the empirical fact that other States and urban centers prohibit particular types of weapons. Chicago has a law very similar to the District's, and many of its suburbs also ban handgun possession under most circumstances. See Chicago, Ill., Municipal Code §§8–20–030(k), 8–20–40, 8–20–50(c) (2008); Evanston, Ill., City Code §9–8–2 (2007); Morton Grove, Ill., Village Code §6–2–3(C) (2007); Oak Park, Ill., Village Code §27–2–1 (2007); Winnetka, Ill., Village Ordinance §9.12.020(B) (2008), online at http://www.amlegal.com/library/il/winnetka.shtml; Wilmette, Ill., Ordinance §12–24(b) (2008), online at http://www.amlegal.com/library/il/wilmette.shtml. Toledo bans certain types of handguns. Toledo, Ohio, Municipal Code §549.25 (2008). And San Francisco in 2005 enacted by popular referendum a ban on most handgun possession by city residents; it has been precluded from enforcing that prohibition, however, by state-court decisions deeming it pre-empted by state law. See *Fiscal* v. *City and County of San Francisco*, 158 Cal.

App. 4th 895, 900–902, 70 Cal. Rptr. 3d 324, 326–328 (2008). (Indeed, the fact that as many as 41 States may pre-empt local gun regulation suggests that the absence of more regulation like the District's may perhaps have more to do with state law than with a lack of locally perceived need for them. See Legal Community Against Violence, Regulating Guns in America 14 (2006), http://www.lcav.org/Library/reports_analyses/National_Audit_Total_8.16.06.pdf.)

In addition, at least six States and Puerto Rico impose general bans on certain types of weapons, in particular assault weapons or semiautomatic weapons. See Cal. Penal Code Ann. §12280(b) (West Supp. 2008); Conn. Gen. Stat. §53–202c (2007); Haw. Rev. Stat. §134–8 (1993); Md. Crim. Law Code Ann. §4–303(a) (Lexis 2002); Mass. Gen. Laws, ch. 140, §131M (West 2006); N. Y. Penal Law Ann. §265.02(7) (West Supp. 2008); 25 Laws P. R. Ann. §456m (Supp. 2006); see also 18 U. S. C. §922(*o*) (federal machinegun ban). And at least 14 municipalities do the same. See Albany, N. Y., Municipal Code §193–16(A) (2005); Aurora, Ill., Ordinance §29–49(a) (2007); Buffalo, N. Y., City Code §180–1(F) (2000); Chicago, Ill., Municipal Code §§8–24–025(a), 8–20–030(h); Cincinnati, Ohio, Municipal Code §708–37(a) (Supp. 2008); Cleveland, Ohio, Ordinance §628.03(a) (2007); Columbus, Ohio, City Code §2323.31 (2008); Denver, Colo., Revised Municipal Code §38–130(e) (2008); Morton Grove, Ill., Village Code §6–2–3(B) (2007); N. Y. C. Admin. Code §10–303.1 (1996 and Supp. 2007); Oak Park, Ill., Village Code §27–2-1 (2007); Rochester, N. Y., Code §47–5(f) (2008), online at http://www.ci.rochester.ny.us/index.cfm?id=112; South Bend, Ind., Ordinance §§13–97(b), 13–98 (2008), online at http://library2.municode.comm//default/DocView13974/1/2; Toledo, Ohio, Municipal Code §549.23(a). These bans, too, suggest that there may be no substitute to an outright prohibition in cases where a governmental body has deemed a particular type of weapon especially dangerous.

D

The upshot is that the District's objectives are compelling; its predictive judgments as to its law's tendency to achieve those objectives are adequately supported; the law does impose a burden upon any self-defense interest that the Amendment seeks to secure; and there is no clear less restrictive alternative. I turn now to the final portion of the "permissible regulation" question: Does the District's law *disproportionately* burden Amendment-protected interests? Several considerations, taken together, convince me that it does not.

First, the District law is tailored to the life-threatening problems it attempts to address. The law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition. The area that falls within its scope is totally urban. Cf. *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 563 (2001) (varied effect of statewide speech restriction in "rural, urban, or suburban" locales "demonstrates a lack of narrow tailoring"). That urban area suffers from a serious handgun-fatality problem. The District's law directly aims at that compelling problem. And there is no less restrictive way to achieve the problem-related benefits that it seeks.

Second, the self-defense interest in maintaining loaded handguns in the home to shoot intruders is not the *primary* interest, but at most a subsidiary interest, that the Second Amendment seeks to serve. The Second Amendment's language, while speaking of a "Militia," says nothing of "self-defense." As JUSTICE STEVENS points out, the Second Amendment's drafting history shows that the language reflects the Framers' primary, if not exclusive, objective. See *ante*, at 652–662 (dissenting opinion). And the majority itself says that "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was *the* reason that right . . . was codified in a written Consti-

tution." *Ante*, at 599 (emphasis added). The *way* in which the Amendment's operative clause seeks to promote that interest—by protecting a right "to keep and bear Arms"—may *in fact* help further an interest in self-defense. But a factual connection falls far short of a primary objective. The Amendment itself tells us that militia preservation was first and foremost in the Framers' minds. See *Miller*, 307 U. S., at 178 ("With obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantee of the Second Amendment were made," and the Amendment "must be interpreted and applied with that end in view").

Further, any self-defense interest at the time of the framing could not have focused exclusively upon urban-crime-related dangers. Two hundred years ago, most Americans, many living on the frontier, would likely have thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways. See Dept. of Commerce, Bureau of Census, Population: 1790 to 1990 (1998) (Table 4), online at http://www.census.gov/population/censusdata/table-4.pdf (of the 3,929,214 Americans in 1790, only 201,655—about 5%—lived in urban areas). Insofar as the Framers focused at all on the tiny fraction of the population living in large cities, they would have been aware that these city dwellers were subject to firearm restrictions that their rural counterparts were not. See *supra*, at 683–686. They are unlikely then to have thought of a right to keep loaded handguns in homes to confront intruders in urban settings as *central*. And the subsequent development of modern urban police departments, by diminishing the need to keep loaded guns nearby in case of intruders, would have moved any such right even further away from the heart of the Amendment's more basic protective ends. See, *e. g.*, Sklansky, The Private

Police, 46 UCLA L. Rev. 1165, 1206–1207 (1999) (professional urban police departments did not develop until roughly the mid-19th century).

Nor, for that matter, am I aware of any evidence that *handguns* in particular were central to the Framers' conception of the Second Amendment. The lists of militia-related weapons in the late-18th-century state statutes appear primarily to refer to other sorts of weapons, muskets in particular. See *Miller*, *supra*, at 180–182 (reproducing colonial militia laws). Respondent points out in his brief that the Federal Government and two States at the time of the founding had enacted statutes that listed handguns as "acceptable" militia weapons. Brief for Respondent 47. But these statutes apparently found them "acceptable" only for certain special militiamen (generally, certain soldiers on horseback), while requiring muskets or rifles for the general infantry. See Act of May 8, 1792, ch. XXXIII, 1 Stat. 271; Laws of the State of North Carolina 592 (1791); First Laws of the State of Connecticut 150 (J. Cushing ed. 1982); see also 25 Journals of the Continental Congress 1774–1789, pp. 741–742 (G. Hunt ed. 1922).

Third, irrespective of what the Framers *could have thought*, we know what they *did think*. Samuel Adams, who lived in Boston, advocated a constitutional amendment that would have precluded the Constitution from ever being "'construed'" to "'prevent the people of the United States, who are peaceable citizens, from keeping their own arms.'" 6 Documentary History of the Ratification of the Constitution 1453 (J. Kaminski & G. Saladino eds. 2000). Samuel Adams doubtless knew that the Massachusetts Constitution contained somewhat similar protection. And he doubtless knew that Massachusetts law prohibited Bostonians from keeping loaded guns in the house. So how could Samuel Adams have advocated such protection *unless* he thought that the protection was *consistent* with local regulation that seriously impeded urban residents from using their arms

against intruders? It seems unlikely that he meant to deprive the Federal Government of power (to enact Boston-type weapons regulation) that he knew Boston had and (as far as we know) he would have thought constitutional under the Massachusetts Constitution. Indeed, since the District of Columbia (the subject of the Seat of Government Clause, U. S. Const., Art. I, §8, cl. 17) was the only *urban* area under direct federal control, it seems unlikely that the Framers thought about *urban* gun control at all. Cf. *Palmore* v. *United States*, 411 U. S. 389, 398 (1973) (Congress can "legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it").

Of course the District's law and the colonial Boston law are not identical. But the Boston law disabled an even wider class of weapons (indeed, all firearms). And its existence shows at the least that local legislatures could impose (as here) serious restrictions on the right to use firearms. Moreover, as I have said, Boston's law, though highly analogous to the District's, was not the *only* colonial law that could have impeded a homeowner's ability to shoot a burglar. Pennsylvania's and New York's laws could well have had a similar effect. See *supra*, at 686. And the Massachusetts and Pennsylvania laws were not only thought consistent with an *unwritten* common-law gun-possession right, but also consistent with *written* state constitutional provisions providing protections similar to those provided by the Federal Second Amendment. See *supra*, at 685–686. I cannot agree with the majority that these laws are largely uninformative because the penalty for violating them was civil, rather than criminal. *Ante*, at 633–634. The Court has long recognized that the exercise of a constitutional right can be burdened by penalties far short of jail time. See, *e. g.*, *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943) (invalidating $7 per week solicitation fee as applied to religious group);

see also *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 136 (1992) ("A tax based on the content of speech does not become more constitutional because it is a small tax").

Regardless, why would the majority require a precise colonial regulatory analogue in order to save a modern gun regulation from constitutional challenge? After all, insofar as we look to history to discover how we can constitutionally regulate a right to self-defense, we must look, not to what 18th-century legislatures actually *did* enact, but to what they would have thought they *could* enact. There are innumerable policy-related reasons why a legislature might not act on a particular matter, despite having the power to do so. This Court has "frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States* v. *Wells*, 519 U. S. 482, 496 (1997) (internal quotation marks and brackets omitted). It is similarly "treacherous" to reason from the fact that colonial legislatures *did not* enact certain kinds of legislation to a conclusion that a modern legislature *cannot* do so. The question should not be whether a modern restriction on a right to self-defense *duplicates* a past one, but whether that restriction, when compared with restrictions originally thought possible, enjoys a similarly strong justification. At a minimum that similarly strong justification is what the District's modern law, compared with Boston's colonial law, reveals.

Fourth, a contrary view, as embodied in today's decision, will have unfortunate consequences. The decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. See *ante*, at 626–627, and n. 26. And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time.

As important, the majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems. The majority says that it leaves the District "a variety of tools for combating" such problems. *Ante*, at 636. It fails to list even one seemingly adequate replacement for the law it strikes down. I can understand how reasonable individuals can disagree about the merits of strict gun control as a crime-control measure, even in a totally urbanized area. But I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order.

V

The majority derides my approach as "judge-empowering." *Ante*, at 634. I take this criticism seriously, but I do not think it accurate. As I have previously explained, this is an approach that the Court has taken in other areas of constitutional law. See *supra*, at 690. Application of such an approach, of course, requires judgment, but the very nature of the approach—requiring careful identification of the relevant interests and evaluating the law's effect upon them—limits the judge's choices; and the method's necessary transparency lays bare the judge's reasoning for all to see and to criticize.

The majority's methodology is, in my view, substantially less transparent than mine. At a minimum, I find it difficult to understand the reasoning that seems to underlie certain conclusions that it reaches.

The majority spends the first 54 pages of its opinion attempting to rebut JUSTICE STEVENS' evidence that the Amendment was enacted with a purely militia-related purpose. In the majority's view, the Amendment also protects

an interest in armed personal self-defense, at least to some degree. But the majority does not tell us precisely what that interest is. "Putting all of [the Second Amendment's] textual elements together," the majority says, "we find that they guarantee the individual right to possess and carry weapons in case of confrontation." *Ante*, at 592. Then, three pages later, it says that "we do not read the Second Amendment to permit citizens to carry arms for *any sort* of confrontation." *Ante*, at 595. Yet, with one critical exception, it does not explain which confrontations count. It simply leaves that question unanswered.

The majority does, however, point to one type of confrontation that counts, for it describes the Amendment as "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Ante*, at 635. What is its basis for finding that to be the core of the Second Amendment right? The only historical sources identified by the majority that even appear to touch upon that specific matter consist of an 1866 newspaper editorial discussing the Freedmen's Bureau Act, see *ante*, at 615, two quotations from that 1866 Act's legislative history, see *ante*, at 615–616, and a 1980 state-court opinion saying that in colonial times the same were used to defend the home as to maintain the militia, see *ante*, at 624–625. How can citations such as these support the far-reaching proposition that the Second Amendment's primary concern is not its stated concern about the militia, but rather a right to keep loaded weapons at one's bedside to shoot intruders?

Nor is it at all clear to me how the majority decides *which* loaded "arms" a homeowner may keep. The majority says that that Amendment protects those weapons "typically possessed by law-abiding citizens for lawful purposes." *Ante*, at 625. This definition conveniently excludes machineguns, but permits handguns, which the majority describes as "the most popular weapon chosen by Americans for self-defense

in the home." *Ante*, at 629; see also *ante*, at 626–627. But what sense does this approach make? According to the majority's reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the Second Amendment *does*, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.

I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny. These consist of (1) "prohibitions on carrying concealed weapons"; (2) "prohibitions on the possession of firearms by felons"; (3) "prohibitions on the possession of firearms by . . . the mentally ill"; (4) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (5) government "conditions and qualifications" attached to "the commercial sale of arms." *Ibid.* Why these? Is it that similar restrictions existed in the late-18th century? The majority fails to cite any colonial analogues. And even were it possible to find analogous colonial laws in respect to all these restrictions, why should these colonial laws count, while the Boston loaded-gun restriction (along with the other laws I have identified) apparently does not count? See *supra*, at 685, 717–718.

At the same time the majority ignores a more important question: Given the purposes for which the Framers enacted

the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pick up a loaded gun on their parents' bedside table? That they (who certainly showed concern for the risk of fire, see *supra*, at 684–686) would have lacked concern for the risk of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring? Unless we believe that they intended future generations to ignore such matters, answering questions such as the questions in this case requires judgment—judicial judgment exercised within a framework for constitutional analysis that guides that judgment and which makes its exercise transparent. One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit*.

The argument about method, however, is by far the less important argument surrounding today's decision. Far more important are the unfortunate consequences that today's decision is likely to spawn. Not least of these, as I have said, is the fact that the decision threatens to throw into doubt the constitutionality of gun laws throughout the United States. I can find no sound legal basis for launching the courts on so formidable and potentially dangerous a mission. In my view, there simply is no untouchable constitutional right guaranteed by the Second Amendment to keep loaded handguns in the house in crime-ridden urban areas.

VI

For these reasons, I conclude that the District's measure is a proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it. And,

for these reasons as well as the independently sufficient reasons set forth by JUSTICE STEVENS, I would find the District's measure consistent with the Second Amendment's demands.

With respect, I dissent.

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DAVIS *v.* FEDERAL ELECTION COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 07–320. Argued April 22, 2008—Decided June 26, 2008

Federal-law limits on the amount of contributions a House of Representatives candidate and his authorized committee may receive from an individual, and the amount his party may devote to coordinated campaign expenditures, 2 U. S. C. §§ 441a(a)(1)(A), (a)(3)(A), (c), and (d), normally apply equally to all competitors for a seat and their authorized committees. However, § 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U. S. C. § 441a–1(a), part of the so-called "Millionaire's Amendment," fundamentally alters this scheme when, as a result of a candidate's expenditure of personal funds, the "opposition personal funds amount" (OPFA) exceeds $350,000. The OPFA is a statistic comparing competing candidates' personal expenditures and taking account of certain other fundraising. When a "self-financing" candidate's personal expenditure causes the OPFA to pass $350,000, a new, asymmetrical regulatory scheme comes into play. The self-financing candidate remains subject to the normal limitations, but his opponent, the "non-self-financing" candidate, may receive individual contributions at treble the normal limit from individuals who have reached the normal limit on aggregate contributions, and may accept coordinated party expenditures without limit. See §§ 441a–1(a)(1)(A)–(C). Because calculating the OPFA requires certain information about the self-financing candidate's campaign assets and personal expenditures, § 319(b) requires him to file an initial "declaration of intent" revealing the amount of personal funds the candidate intends to spend in excess of $350,000, and to make additional disclosures to the other candidates, their national parties, and the Federal Election Commission (FEC) as his personal expenditures exceed certain benchmarks.

Appellant Davis, a candidate for a House seat in 2004 and 2006 who lost both times to the incumbent, notified the FEC for the 2006 election, in compliance with § 319(b), that he intended to spend $1 million in personal funds. After the FEC informed him it had reason to believe he had violated § 319 by failing to report personal expenditures during the 2004 campaign, he filed this suit for a declaration that § 319 is unconstitutional and an injunction preventing the FEC from enforcing the section during the 2006 election. The District Court concluded *sua sponte*

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that Davis had standing, but rejected his claims on the merits and granted the FEC summary judgment.

Held:

1. This Court has jurisdiction to hear Davis' appeal. Pp. 732–736.

(a) Davis has standing to challenge §319(b)'s disclosure requirements. When he filed suit, he had already declared his 2006 candidacy and had been forced by §319(b) to disclose to his opponent that he intended to spend more than $350,000 in personal funds. He also faced the imminent threat that he would have to follow up on that disclosure with further notifications once he passed the $350,000 mark. Securing a declaration that §319(b) is unconstitutional and an injunction against its enforcement would have spared him from making those disclosures and also would have removed the real threat that the FEC would pursue an enforcement action based on alleged §319(b) violations during his 2004 campaign. Davis also has standing to challenge §319(a)'s asymmetrical contribution limits. The standing inquiry focuses on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed, see, *e. g.*, *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 180, and a party facing prospective injury has standing where the threatened injury is real, immediate, and direct, see, *e. g.*, *Los Angeles* v. *Lyons*, 461 U. S. 95, 102. Davis faced the requisite injury from §319(a) when he filed suit: He had already declared his candidacy and his intent to spend more than $350,000 of personal funds in the general election campaign whose onset was rapidly approaching. Section 319(a) would shortly burden his personal expenditure by allowing his opponent to receive contributions on more favorable terms, and there was no indication that his opponent would forgo that opportunity. Pp. 733–735.

(b) The FEC's argument that the Court lacks jurisdiction because Davis' claims are moot also fails. In *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, this Court rejected a very similar claim of mootness, finding that the case "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Id.*, at 462. That "exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Ibid.* First, despite BCRA's command that the case be expedited to the greatest possible extent and Davis' request that his case be resolved before the 2006 election, the case could not be resolved before the 2006 election. See *ibid.* Second, the FEC has conceded that Davis'

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§319(a) claim would be capable of repetition if he planned to self-finance another bid for a House seat, and he subsequently made a public statement expressing his intent to do so. See *id.*, at 463. Pp. 735–736.

2. Sections 319(a) and (b) violate the First Amendment. If §319(a)'s elevated contribution limits applied across the board to all candidates, Davis would have no constitutional basis for challenging them. Section 319(a), however, raises the limits only for non-self-financing candidates and only when the self-financing candidate's expenditure of personal funds causes the OPFA threshold to be exceeded. This Court has never upheld the constitutionality of a law that imposes different contribution limits for candidates competing against each other, and it agrees with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech. In *Buckley* v. *Valeo*, 424 U. S. 1, the Court soundly rejected a cap on a candidate's expenditure of personal funds to finance campaign speech, holding that a "candidate . . . has a First Amendment right to . . . vigorously and tirelessly . . . advocate his own election," and that a cap on personal expenditures imposes "a substantial," "clea[r,]" and "direc[t]" restraint on that right, *id.*, at 52–53. It found the cap at issue not justified by "[t]he primary governmental interest" in "the prevention of actual and apparent corruption of the political process," *id.*, at 53, or by "[t]he ancillary interest in equalizing the relative financial resources of candidates competing for elective office," *id.*, at 54. *Buckley* is instructive here. While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right, requiring him to choose between the right to engage in unfettered political speech and subjection to discriminatory fundraising limitations. The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice. *Id.*, at 54–57, and n. 65, distinguished. The burden is not justified by any governmental interest in eliminating corruption or the perception of corruption, see *id.*, at 53. Nor can an interest in leveling electoral opportunities for candidates of different personal wealth justify §319(a)'s asymmetrical limits, see *id.*, at 56–57. The Court has never recognized this interest as a legitimate objective and doing so would have ominous implications for the voters' authority to evaluate the strengths of candidates competing for office. Finally, the Court rejects the Government's argument that §319(a) is justified because it ameliorates the deleterious effects resulting from the tight limits federal election law places on individual campaign contributions and coordinated party expenditures. Whatever this argument's merits as an original matter, it is fundamentally at war with *Buckley*'s analysis of expenditure and contri-

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butions limits, which this Court has applied in subsequent cases. Pp. 736–744.

3. Because §319(a) is unconstitutional, §319(b)'s disclosure requirements, which were designed to implement the asymmetrical contribution limits, are as well. "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," *Buckley*, 424 U. S., at 64, so the Court closely scrutinizes such requirements, *id.*, at 75. For significant encroachments to survive, there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," and the governmental interest must reflect the seriousness of the burden on First Amendment rights. *Id.*, at 64. Given §319(a)'s unconstitutionality, the burden imposed by the §319(b) requirements cannot be justified. P. 744.

501 F. Supp. 2d 22, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined, and in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined as to Part II. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined as to Part II, *post*, p. 749. GINSBURG, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined, *post*, p. 758.

Andrew D. Herman argued the cause for appellant. With him on the briefs was *Stanley M. Brand*.

Former *Solicitor General Clement* argued the cause for appellee. With him on the brief were *Acting Solicitor General Garre*, *Malcolm L. Stewart*, *Thomasenia P. Duncan*, *David Kolker*, *Kevin Deeley*, and *Holly J. Baker*.*

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*Briefs of *amici curiae* urging reversal were filed for the Center for Competitive Politics by *Erik S. Jaffe*; and for Gene DeRossett et al. by *Kathleen M. Sullivan*.

Briefs of *amici curiae* urging affirmance were filed for Common Cause by *Bradley S. Phillips*; and for Democracy 21 et al. by *Seth P. Waxman*, *Randolph D. Moss*, *Roger M. Witten*, *Donald J. Simon*, *J. Gerald Hebert*, *Paul S. Ryan*, *Tara Malloy*, *Scott L. Nelson*, *Fred Wertheimer*, and *Deborah Goldberg*.

Briefs of *amici curiae* were filed for the Cato Institute by *Benjamin D. Wood*, *William J. McGinley*, *Glenn M. Willard*, and *Ilya Shapiro*; and for

JUSTICE ALITO delivered the opinion of the Court.

In this appeal, we consider the constitutionality of federal election law provisions that, under certain circumstances, impose different campaign contribution limits on candidates competing for the same congressional seat.

I

A

Federal law limits the amount of money that a candidate for the House of Representatives and the candidate's authorized committee may receive from an individual, as well as the amount that the candidate's party may devote to coordinated campaign expenditures. 2 U. S. C. § 441a (2006 ed.).[1] Under the usual circumstances, the same restrictions apply to all the competitors for a seat and their authorized committees. Contributions from individual donors during a 2-year election cycle are subject to a cap, which is currently set at $2,300. See §§ 441a(a)(1)(A), (c); 72 Fed. Reg. 5295 (2007). In addition, no funds may be accepted from an individual whose aggregate contributions to candidates and their committees during the election cycle have reached the legal limit, currently $42,700. See 2 U. S. C. §§ 441a(a)(3)(A), (c); 72 Fed. Reg. 5295. A candidate also may not accept general election coordinated expenditures by national or state political party committees that exceed an imposed limit. See 2 U. S. C. §§ 441a(c), (d). Currently, the limit for candidates in States with more than one House seat is $40,900. 72 Fed. Reg. 5294.[2]

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the James Madison Center for Free Speech et al. by *James Bopp, Jr.*, and *Richard E. Coleson*.

[1] All undesignated references in this opinion to 2 U. S. C. are to the 2006 edition.

[2] These limits are adjusted for inflation every two years. 2 U. S. C. § 441a(c).

Section 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 109, 2 U. S. C. §441a–1(a),[3] part of the so-called "Millionaire's Amendment," fundamentally alters this scheme when, as a result of a candidate's expenditure of personal funds, the "opposition personal funds amount" (OPFA) exceeds $350,000.[4] The OPFA, in simple terms, is a statistic that compares the expenditure of personal funds by competing candidates and also takes into account to some degree certain other fundraising.[5] See §441a–1(a). When a candidate's expenditure of personal funds causes the OPFA to pass the $350,000 mark (for convenience, such candidates will be referred to as "self-financing"), a new, asymmetrical regulatory scheme comes into play. The self-financing candidate remains subject to the limitations noted above, but the candidate's opponent (the "non-self-financing" candidate) may receive individual contributions at treble the normal limit (*e. g.*, $6,900 rather than the current $2,300), even from individuals who have reached the normal aggregate contributions cap, and may accept coordinated party expenditures without limit. See §§441a–1(a)(1)(A)–(C). Once the non-self-financing candidate's receipts exceed the OPFA, the prior limits are revived. §441a–1(a)(3). A candidate who does not spend the

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[3] BCRA §§319(a) and (b) are set out in an appendix to this opinion. Although what we refer to as §§319(a) and (b) are actually §315A(a) and (b) of the Federal Election Campaign Act of 1971, which were added to that Act by BCRA §319(a), we follow the convention of the parties in making reference to §§319(a) and (b).

[4] BCRA §304 similarly regulates self-financed Senate bids. 116 Stat. 97, 2 U. S. C. §441a(i).

[5] The OPFA is calculated as follows. For each candidate, expenditures of personal funds are added to 50% of the funds raised for the election at issue measured at designated dates in the year preceding the election. The resulting figures are compared, and if the difference is greater than $350,000, the asymmetrical limits take effect. See §§441a–1(a)(1), (2).

contributions received under the asymmetrical limits must return them. § 441a–1(a)(4).

In order to calculate the OPFA, certain information is needed about the self-financing candidate's campaign assets and personal expenditures. Section 319(b) thus requires self-financing candidates to make three types of disclosures. First, within 15 days after entering a race, a candidate must file a "[d]eclaration of intent" revealing the amount of personal funds the candidate intends to spend in excess of $350,000. 2 U. S. C. § 441a–1(b)(1)(B). A candidate who does not intend to cross this threshold may simply declare an intent to spend no personal funds. 11 CFR § 400.20(a)(2) (2008). Second, within 24 hours of crossing or becoming obligated to cross the $350,000 mark, the candidate must file an "[i]nitial notification." 2 U. S. C. § 441a–1(b)(1)(C). Third, the candidate must file an "[a]dditional notification" within 24 hours of making or becoming obligated to make each additional expenditure of $10,000 or more using personal funds. § 441a–1(b)(1)(D). The initial and additional notifications must provide the date and amount of each expenditure from personal funds, and all notifications must be filed with the Federal Election Commission (FEC), all other candidates for the seat, and the national parties of all those candidates. § 441a–1(b)(1)(E). Failure to comply with the reporting requirements may result in civil and criminal penalties. §§ 437g(a)(5)–(6), (d)(1).

A non-self-financing candidate and the candidate's committee face less extensive disclosure requirements. Within 24 hours after receiving an "initial" or "additional" notification filed by a self-financing opponent, a non-self-financing candidate must provide notice to the FEC and the national and state committees of the candidate's party if the non-self-financing candidate concludes based on the newly acquired information that the OPFA has passed the $350,000 mark. 11 CFR § 400.30(b)(2). In addition, when the additional contributions that a non-self-financing candidate is authorized

to receive pursuant to the asymmetrical limitations scheme equals the OPFA, the non-self-financing candidate must notify the FEC and the appropriate national and state committees within 24 hours. §400.31(e)(1)(ii). The non-self-financing candidate must also provide notice regarding any refunds of "excess funds" (funds received under the increased limits but not used in the campaign). §§400.50, 400.54. For their part, political parties must notify the FEC and the candidate they support within 24 hours of making any expenditures that exceed the normal limit for coordinated party expenditures. §400.30(c)(2).

B

Appellant Jack Davis was the Democratic candidate for the House of Representatives from New York's 26th Congressional District in 2004 and 2006. In both elections, he lost to the incumbent. In his brief, Davis discloses having spent $1.2 million, principally his own funds, on his 2004 campaign. Brief for Appellant 4. He reports spending $2.3 million in 2006, all but $126,000 of which came from personal funds. *Id.*, at 13. His opponent in 2006 spent no personal funds. Indeed, although the OPFA calculation provided the opportunity for Davis' opponent to raise nearly $1.5 million under §319(a)'s asymmetrical limits, Davis' opponent adhered to the normal contribution limits.

Davis' 2006 candidacy began in March 2006, when he filed with the FEC a "Statement of Candidacy" and, in compliance with §319(b), declared that he intended to spend $1 million in personal funds during the general election. Two months later, in anticipation of this expenditure and its §319 consequences, Davis filed suit against the FEC, requesting that §319 be declared unconstitutional and that the FEC be enjoined from enforcing it during the 2006 election.

After Davis declared his candidacy but before he filed suit, the FEC's general counsel notified him that it had reason to believe that he had violated §319 by failing to report per-

sonal expenditures during the 2004 campaign. The FEC proposed a conciliation agreement under which Davis would pay a substantial civil penalty. Davis responded by agreeing to toll the limitations period for an FEC enforcement action until resolution of this suit.

Davis filed this action in the United States District Court for the District of Columbia, and a three-judge panel was convened. BCRA § 403, 116 Stat. 113, note following 2 U. S. C. § 437h. While Davis requested that the case be decided before the general election campaign began on September 12, 2006, the FEC opposed the request, asserting the need for extensive discovery, and the request was denied. Ultimately, the parties filed cross-motions for summary judgment.

Ruling on those motions, the District Court began by addressing Davis' standing *sua sponte*. The court concluded that Davis had standing, but rejected his claims on the merits and granted summary judgment for the FEC. 501 F. Supp. 2d 22 (2007). Davis then invoked BCRA's exclusive avenue for appellate review—direct appeal to this Court. Note following § 437h. We deferred full consideration of our jurisdiction, 552 U. S. 1135 (2008), and we now reverse.

II

Like the District Court, we must first ensure that we have jurisdiction to hear Davis' appeal. Article III restricts federal courts to the resolution of cases and controversies. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64 (1997). That restriction requires that the party invoking federal jurisdiction have standing—the "personal interest that must exist at the commencement of the litigation." *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000) (internal quotation marks omitted). But it is not enough that the requisite interest exist at the outset. "To qualify as a case fit for

federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English*, *supra*, at 67. The FEC argues that Davis' appeal fails to present a constitutional case or controversy because Davis lacks standing and because his claims are moot. We address each of these issues in turn.

A

As noted, the requirement that a claimant have "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992); see also *Arizonans for Official English*, *supra*, at 64. To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling. *Lujan*, *supra*, at 560–561.

The District Court held, and the parties do not dispute, that Davis possesses standing to challenge the disclosure requirements of §319(b). When Davis filed suit, he had already declared his 2006 candidacy and had been forced by §319(b) to disclose to his opponent that he intended to spend more than $350,000 in personal funds. At that time, Davis faced the imminent threat that he would have to follow up on that disclosure with further notifications after he in fact passed the $350,000 mark. Securing a declaration that §319(b)'s requirements are unconstitutional and an injunction against their enforcement would have spared him from making those disclosures. That relief also would have removed the real threat that the FEC would pursue an enforcement action based on alleged violations of §319(b) during his 2004 campaign. As a result, Davis possesses standing to challenge §319(b)'s disclosure requirement.

The fact that Davis has standing to challenge §319(b) does not necessarily mean that he also has standing to challenge

the scheme of contribution limitations that applies when §319(a) comes into play. "[S]tanding is not dispensed in gross." *Lewis* v. *Casey*, 518 U. S. 343, 358, n. 6 (1996). Rather, "a plaintiff must demonstrate standing for each claim he seeks to press" and "'for each form of relief'" that is sought. *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 352 (2006) (quoting *Friends of Earth*, *supra*, at 185).

In light of these principles, the FEC argues that Davis lacks standing to attack §319(a)'s asymmetrical limits. When Davis commenced this action, his opponent had not yet qualified for the asymmetrical limits, and later, when his opponent did qualify to take advantage of those limits, he chose not to do so. Accordingly, the FEC argues that §319(a) did not cause Davis any injury.

While the proof required to establish standing increases as the suit proceeds, see *Lujan*, *supra*, at 561, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed. *Friends of Earth*, *supra*, at 180; *Arizonans for Official English*, *supra*, at 68, n. 22. As noted above, the injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct. *Los Angeles* v. *Lyons*, 461 U. S. 95, 102 (1983); see also *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298 (1979) (A plaintiff may challenge the prospective operation of a statute that presents a realistic and impending threat of direct injury). Davis faced such an injury from the operation of §319(a) when he filed suit. Davis had declared his candidacy and his intent to spend more than $350,000 of personal funds in the general election campaign whose onset was rapidly approaching. Section 319(a) would shortly burden his expenditure of personal funds by allowing his opponent to receive contributions on more favorable terms, and there was no indication that his opponent would forgo that opportunity. In-

deed, the record at summary judgment indicated that most candidates who had the opportunity to receive expanded contributions had done so. App. 89. In these circumstances, we conclude that Davis faced the requisite injury from §319(a) when he filed suit and has standing to challenge that provision's asymmetrical contribution scheme.

B

The FEC's mootness argument also fails. This case closely resembles *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449 (2007). There, Wisconsin Right to Life (WRTL), a nonprofit, ideological advocacy corporation, wished to run radio and TV ads within 30 days of the 2004 Wisconsin primary, contrary to a restriction imposed by BCRA. WRTL sued the FEC, seeking declaratory and injunctive relief. Although the suit was not resolved before the 2004 election, we rejected the FEC's claim of mootness, finding that the case "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Id.*, at 462. That "exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Ibid.* (quoting *Spencer* v. *Kemna*, 523 U. S. 1, 17 (1998)).

In *WRTL*, "despite BCRA's command that the cas[e] be expedited 'to the greatest possible extent,'" WRTL's claims could not reasonably be resolved before the election concluded. 551 U. S., at 462 (quoting §403(a)(4), 116 Stat. 114, note following 2 U. S. C. §437h). Similarly, in this case despite BCRA's mandate to expedite and Davis' request that his case be resolved before the 2004 general election season commenced, Davis' case could not be resolved before the 2006 election concluded, demonstrating that his claims are capable of evading review.

As to the second prong of the exception, even though WRTL raised an as-applied challenge, we found its suit capable of repetition where "WRTL credibly claimed that it planned on running 'materially similar' future" ads subject to BCRA's prohibition and had, in fact, sought an injunction that would permit such an ad during the 2006 election. 551 U. S., at 463 (some internal quotation marks omitted). Here, the FEC conceded in its brief that Davis' §319(a) claim would be capable of repetition if Davis planned to self-finance another bid for a House seat. Brief for Appellee 14, 20–21, and n. 5. Davis subsequently made a public statement expressing his intent to do so. See Reply Brief 16 (citing Terreri, Democrat Davis Confirms He'll Run Again for Congress, Rochester Democrat and Chronicle, Mar. 27, 2008, p. 5B). As a result, we are satisfied that Davis' facial challenge is not moot.[6]

III

We turn to the merits of Davis' claim that the First Amendment is violated by the contribution limits that apply when §319(a) comes into play. Under this scheme, as previously noted, when a candidate spends more than $350,000 in personal funds and creates what the statute apparently regards as a financial imbalance, that candidate's opponent may qualify to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated party expenditures. Davis contends that §319(a) unconstitutionally burdens his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures that create the imbalance has the effect of enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of Davis' own speech.

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[6] In light of this conclusion, we need not decide whether the threat of an FEC enforcement action for alleged 2004 violations would be sufficient to keep this controversy alive.

A

If §319(a) simply raised the contribution limits for all candidates, Davis' argument would plainly fail. This Court has previously sustained the facial constitutionality of limits on discrete and aggregate individual contributions and on coordinated party expenditures. *Buckley* v. *Valeo*, 424 U. S. 1, 23–35, 38, 46–47, and n. 53 (1976) *(per curiam)*; *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 437, 465 (2001) *(Colorado II)*. At the same time, the Court has recognized that such limits implicate First Amendment interests and that they cannot stand unless they are "closely drawn" to serve a "sufficiently important interest," such as preventing corruption and the appearance of corruption. See, *e. g.*, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 136, 138, n. 40 (2003); *Colorado II*, *supra*, at 456; *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 387–388 (2000); *Buckley*, *supra*, at 25–30, 38. When contribution limits are challenged as too restrictive, we have extended a measure of deference to the judgment of the legislative body that enacted the law. See, *e. g.*, *Randall* v. *Sorrell*, 548 U. S. 230, 248 (2006) (plurality opinion); *Nixon*, *supra*, at 396–397; *Buckley*, *supra*, at 30, 111, 103–104. But we have held that limits that are too low cannot stand. *Randall*, 548 U. S., at 246–262; *id.*, at 263 (ALITO, J., concurring in part and concurring in judgment).

There is, however, no constitutional basis for attacking contribution limits on the ground that they are too high. Congress has no constitutional obligation to limit contributions at all; and if Congress concludes that allowing contributions of a certain amount does not create an undue risk of corruption or the appearance of corruption, a candidate who wishes to restrict an opponent's fundraising cannot argue that the Constitution demands that contributions be regulated more strictly. Consequently, if §319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits.

B

Section 319(a), however, does not raise the contribution limits across the board. Rather, it raises the limits only for the non-self-financing candidate and does so only when the self-financing candidate's expenditure of personal funds causes the OPFA threshold to be exceeded. We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other, and we agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech.

In *Buckley*, we soundly rejected a cap on a candidate's expenditure of personal funds to finance campaign speech. We held that a "candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election" and that a cap on personal expenditures imposes "a substantial," "clea[r]," and "direc[t]" restraint on that right. 424 U. S., at 52–53. We found that the cap at issue was not justified by "[t]he primary governmental interest" proffered in its defense, *i. e.*, "the prevention of actual and apparent corruption of the political process." *Id.*, at 53. Far from preventing these evils, "the use of personal funds," we observed, "reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which . . . contribution limitations are directed." *Ibid.* We also rejected the argument that the expenditure cap could be justified on the ground that it served "[t]he ancillary interest in equalizing the relative financial resources of candidates competing for elective office." *Id.*, at 54. This putative interest, we noted, was "clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights." *Ibid.*

Buckley's emphasis on the fundamental nature of the right to spend personal funds for campaign speech is instructive. While BCRA does not impose a cap on a candidate's expendi-

ture of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right. Section 319(a) requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations. Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite §319(a), but they must shoulder a special and potentially significant burden if they make that choice. See *Day* v. *Holahan*, 34 F. 3d 1356, 1359–1360 (CA8 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures); Brief for Appellee 29 (conceding that "[§]319 does impose some consequences on a candidate's choice to self-finance beyond certain amounts"). Under §319(a), the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics. Cf. *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 14 (1986) (plurality opinion) (finding infringement on speech rights where if the plaintiff spoke it could "be forced . . . to help disseminate hostile views").

The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice. In *Buckley*, we held that Congress "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations" even though we found an independent limit on overall campaign expenditures to be unconstitutional. 424 U. S., at 57, n. 65; see *id.*, at 54–58. But the choice involved in *Buckley* was quite different from the choice imposed by §319(a). In *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited per-

sonal expenditures. Here, §319(a) does not provide any way in which a candidate can exercise that right without abridgment. Instead, a candidate who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits. The choice imposed by §319(a) is not remotely parallel to that in *Buckley*.

Because §319(a) imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, that provision cannot stand unless it is "justified by a compelling state interest," *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 256 (1986); see also, *e. g.*, *McConnell*, 540 U. S., at 205; *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 657–658 (1990); *id.*, at 680 (SCALIA, J., dissenting); *id.*, at 701, 702–703 (KENNEDY, J., dissenting); *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 500–501 (1985); *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 609 (1996) *(Colorado I)* (principal opinion); *id.*, at 640–641 (THOMAS, J., concurring in judgment and dissenting in part). No such justification is present here.[7]

The burden imposed by §319(a) on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption. The *Buckley* Court reasoned that reliance on personal funds *re-*

[7] Even if §319(a) were characterized as a limit on contributions rather than expenditures, it is doubtful whether it would survive. A contribution limit involving "'"significant interference"'" with associational rights must be "'"closely drawn"'" to serve a "'"sufficiently important interest."'" *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 136 (2003). For the reasons explained *infra*, at 742, the chief interest proffered in support of the asymmetrical contribution scheme—leveling electoral opportunities—cannot justify the infringement of First Amendment interests.

duces the threat of corruption, and therefore §319(a), by discouraging use of personal funds, disserves the anticorruption interest. Similarly, given Congress' judgment that liberalized limits for non-self-financing candidates do not unduly imperil anticorruption interests, it is hard to imagine how the denial of liberalized limits to self-financing candidates can be regarded as serving anticorruption goals sufficiently to justify the resulting constitutional burden.

The Government maintains that §319(a)'s asymmetrical limits are justified because they "level electoral opportunities for candidates of different personal wealth." Brief for Appellee 34. "Congress enacted Section 319," the Government writes, "to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office." *Id.*, at 33 (emphasis added). Our prior decisions, however, provide no support for the proposition that this is a legitimate government objective. See *Nixon*, 528 U. S., at 428 (THOMAS, J., dissenting) ("'[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances'" (quoting *National Conservative Political Action Comm.*, *supra*, at 496–497)); *Randall*, 548 U. S., at 268 (THOMAS, J., concurring in judgment) (noting "the interests the Court has recognized as compelling, *i. e.*, the prevention of corruption or the appearance thereof"). On the contrary, in *Buckley*, we held that "[t]he interest in equalizing the financial resources of candidates" did not provide a "justification for restricting" candidates' overall campaign expenditures, particularly where equalization "might serve . . . to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." 424 U. S., at 56–57. We have similarly held that the interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections" cannot support a cap on expenditures for "express advocacy of the election or defeat of candidates," as "the concept that govern-

ment may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.*, at 48–49; see also *McConnell*, *supra*, at 227 (noting, in assessing standing, that there is no legal right to have the same resources to influence the electoral process). Cf. *Austin*, *supra*, at 705 (KENNEDY, J., dissenting) (rejecting as "antithetical to the First Amendment" "the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections").

The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office. See *Bellotti*, *supra*, at 791–792 ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments" and "may consider, in making their judgment, the source and credibility of the advocate"). Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices. See *Bellotti*, *supra*, at 791, n. 31 (The "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves").

Finally, the Government contends that § 319(a) is justified because it ameliorates the deleterious effects that result from the tight limits that federal election law places on indi-

vidual campaign contributions and coordinated party expenditures. These limits, it is argued, make it harder for candidates who are not wealthy to raise funds and therefore provide a substantial advantage for wealthy candidates. Accordingly, §319(a) can be seen, not as a legislative effort to interfere with the natural operation of the electoral process, but as a legislative effort to mitigate the untoward consequences of Congress' own handiwork and restore "the 'normal relationship' between a candidate's financial resources and the level of popular support for his candidacy." Brief for Appellee 33.

Whatever the merits of this argument as an original matter, it is fundamentally at war with the analysis of expenditure and contributions limits that this Court adopted in *Buckley* and has applied in subsequent cases. The advantage that wealthy candidates now enjoy and that §319(a) seeks to reduce is an advantage that flows directly from *Buckley*'s disparate treatment of expenditures and contributions. If that approach is sound—and the Government does not urge us to hold otherwise[8]—it is hard to see how undoing the consequences of that decision can be viewed as a compelling interest. If the normally applicable limits on individual contributions and coordinated party contributions are seriously distorting the electoral process, if they are feeding a "public perception that wealthy people can buy seats in Congress," Brief for Appellee 34, and if those limits are not needed in order to combat corruption, then the obvious remedy is to raise or eliminate those limits. But the unprece-

[8] JUSTICE STEVENS would revisit and reject *Buckley*'s treatment of expenditure limits. *Post*, at 750–752 (opinion concurring in part and dissenting in part). The Government has not urged us to take that step, and in any event, JUSTICE STEVENS' proposal is unsound. He suggests that restricting the quantity of campaign speech would improve the quality of that speech, but it would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech. And in any event, there is no reason to suppose that restricting the quantity of campaign speech would have the desired effect.

dented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment.

IV

The remaining issue that we must consider is the constitutionality of §319(b)'s disclosure requirements. "[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U. S., at 64. As a result, we have closely scrutinized disclosure requirements, including requirements governing independent expenditures made to further individuals' political speech. *Id.*, at 75. To survive this scrutiny, significant encroachments "cannot be justified by a mere showing of some legitimate governmental interest." *Id.*, at 64. Instead, there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," and the governmental interest "must survive exacting scrutiny." *Ibid.* (footnotes omitted). That is, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights. *Id.*, at 68, 71.

The §319(b) disclosure requirements were designed to implement the asymmetrical contribution limits provided for in §319(a), and as discussed above, §319(a) violates the First Amendment. In light of that holding, the burden imposed by the §319(b) requirements cannot be justified, and it follows that they too are unconstitutional.[9]

* * *

In sum, we hold that §§319(a) and (b) violate the First Amendment. The judgment of the District Court is re-

[9] Because we conclude that §§319(a) and (b) violate the First Amendment, we need not address Davis' claim that they also violate the equal protection component of the Fifth Amendment's Due Process Clause.

versed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX

BCRA §§ 319(a) and (b) provide:

"(a) Availability of increased limit

"(1) In general

"Subject to paragraph (3), if the opposition personal funds amount with respect to a candidate for election to the office of Representative in, or Delegate or Resident Commissioner to, the Congress exceeds $350,000—

"(A) the limit under subsection (a)(1)(A) with respect to the candidate shall be tripled;

"(B) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to the candidate if the contribution is made under the increased limit allowed under subparagraph (A) during a period in which the candidate may accept such a contribution; and

"(C) the limits under subsection (d) with respect to any expenditure by a State or national committee of a political party on behalf of the candidate shall not apply.

"(2) Determination of opposition personal funds amount

"(A) In general

"The opposition personal funds amount is an amount equal to the excess (if any) of—

"(i) the greatest aggregate amount of expenditures from personal funds (as defined in subsection (b)(1) of this section) that an opposing candidate in the same election makes; over

"(ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

"(B) Special rule for candidate's campaign funds

"(i) In general

"For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (A),

such amount shall include the gross receipts advantage of the candidate's authorized committee.

"(ii) Gross receipts advantage

"For purposes of clause (i), the term 'gross receipts advantage' means the excess, if any, of—

"(I) the aggregate amount of 50 percent of gross receipts of a candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held, over

"(II) the aggregate amount of 50 percent of gross receipts of the opposing candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held.

"(3) Time to accept contributions under increased limit

"(A) In general

"Subject to subparagraph (B), a candidate and the candidate's authorized committee shall not accept any contribution, and a party committee shall not make any expenditure, under the increased limit under paragraph (1)—

"(i) until the candidate has received notification of the opposition personal funds amount under subsection (b)(1) of this section; and

"(ii) to the extent that such contribution, when added to the aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits under this subsection for the election cycle, exceeds 100 percent of the opposition personal funds amount.

"(B) Effect of withdrawal of an opposing candidate

"A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any

expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

"(4) Disposal of excess contributions

"(A) In general

"The aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit under paragraph (1) and not otherwise expended in connection with the election with respect to which such contributions relate shall, not later than 50 days after the date of such election, be used in the manner described in subparagraph (B).

"(B) Return to contributors

"A candidate or a candidate's authorized committee shall return the excess contribution to the person who made the contribution.

"(b) Notification of expenditures from personal funds

"(1) In general

"(A) Definition of expenditure from personal funds

"In this paragraph, the term 'expenditure from personal funds' means—

"(i) an expenditure made by a candidate using personal funds; and

"(ii) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

"(B) Declaration of intent

"Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed $350,000.

"(C) Initial notification

"Not later than 24 hours after a candidate described in subparagraph (B) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of $350,000 in connection with any election, the candidate shall file a notification.

"(D) Additional notification

"After a candidate files an initial notification under subparagraph (C), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceeds $10,000. Such notification shall be filed not later than 24 hours after the expenditure is made.

"(E) Contents

"A notification under subparagraph (C) or (D) shall include—

"(i) the name of the candidate and the office sought by the candidate;

"(ii) the date and amount of each expenditure; and

"(iii) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

"(F) Place of filing

"Each declaration or notification required to be filed by a candidate under subparagraph (C), (D), or (E) shall be filed with—

"(i) the Commission; and

"(ii) each candidate in the same election and the national party of each such candidate.

"(2) Notification of disposal of excess contributions

"In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the candidate's authorized committee shall submit to the Com-

mission a report indicating the source and amount of any excess contributions (as determined under subsection (a) of this section) and the manner in which the candidate or the candidate's authorized committee used such funds.

"(3) Enforcement

"For provisions providing for the enforcement of the reporting requirements under this subsection, see section 437g of this title." 2 U. S. C. § 441a–1 (footnotes omitted).

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join as to Part II, concurring in part and dissenting in part.

The "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002, § 319, 116 Stat. 109, 2 U. S. C. § 441a–1 (2006 ed.), is the product of a congressional judgment that candidates who are willing and able to spend over $350,000 of their own money in seeking election to Congress enjoy an advantage over opponents who must rely on contributions to finance their campaigns. To reduce that advantage, and to combat the perception that congressional seats are for sale to the highest bidder, Congress has relaxed the restrictions that would otherwise limit the amount of contributions that the opponents of self-funding candidates may accept from their supporters. In a thorough and well-reasoned opinion, the District Court held that because the Millionaire's Amendment does not impose any burden whatsoever on the self-funding candidate's freedom to speak, it does not violate the First Amendment, and because it does no more than diminish the unequal strength of the self-funding candidate, it does not violate the equal protection component of the Fifth Amendment. I agree completely with the District Court's opinion, specifically its adherence to our decision in *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93 (2003). While I would affirm for the reasons given by the District Court, I believe it appropriate to add these additional comments on the premise that underlies the

constitutional prohibition on expenditure limitations, and on my reasons for concluding that the Millionaire's Amendment represents a modest, sensible, and plainly constitutional attempt by Congress to minimize the advantages enjoyed by wealthy candidates vis-à-vis those who must rely on the support of others to fund their pursuit of public office.

I

According to the Court's decision in *Buckley* v. *Valeo*, 424 U. S. 1, 18 (1976) *(per curiam)*, the vice that condemns expenditure limitations is that they "impose direct quantity restrictions" on political speech.[1] A limitation on the amount of money that a candidate is permitted to spend, the *Buckley* Court concluded, "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.*, at 19. Accordingly, the Court determined that any regulation of the quantity of money spent on campaigns for office ought to be viewed as a direct regulation of speech itself.

Justice White firmly disagreed with the *Buckley* Court's holding on expenditure limitations, explaining that such regulations should be analyzed, not as direct restrictions on speech, but rather as akin to time, place, and manner regulations, which will be upheld "so long as the purposes they serve are legitimate and sufficiently substantial." *Id.*, at 264 (opinion concurring in part and dissenting in part). Although I did not participate in the Court's decision in *Buckley*, I have since been persuaded that Justice White—who maintained his steadfast opposition to *Buckley*'s view of ex-

[1] The *Buckley* Court invalidated two different types of limits on campaign expenditures: limits on the amount of "personal or family resources" a candidate could spend on his own campaign, 424 U. S., at 51–54, and overall limits on campaign expenditures, *id.*, at 54–60. In my judgment the Court was mistaken in striking down both of those provisions; I treat them together here.

penditure limits, see, *e. g.*, *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 507–512 (1985) (dissenting opinion)—was correct. Indeed, it was *Buckley* that represented a break from 65 years of established practice, as well as a probable departure from the views of the Framers of the relevant provisions of the Constitution itself. See *Randall* v. *Sorrell*, 548 U. S. 230, 274, 280–281 (2006) (STEVENS, J., dissenting).

In my view, a number of purposes, both legitimate and substantial, may justify the imposition of reasonable limitations on the expenditures permitted during the course of any single campaign. For one, such limitations would "free candidates and their staffs from the interminable burden of fundraising." *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 649 (1996) (STEVENS, J., dissenting). Moreover, the imposition of reasonable limitations would likely have the salutary effect of improving the quality of the exposition of ideas. After all, orderly debate is always more enlightening than a shouting match that awards points on the basis of decibels rather than reasons. Quantity limitations are commonplace in any number of other contexts in which high-value speech occurs. Litigants in this Court pressing issues of the utmost importance to the Nation are allowed only a fixed time for oral debate and a maximum number of pages for written argument. As listeners and as readers, judges need time to reflect on the merits of an issue; repetitious arguments are disfavored and are usually especially unpersuasive. Indeed, experts in the art of advocacy agree that "lawyers go on for too long, and when they do it doesn't help their case."[2] It seems to me that Congress is entitled to make the judgment that voters deserve the same courtesy and the same opportu-

[2] Brust, A Voice for the Write: Tips on Making Your Case From a Supremely Reliable Source, 94 A. B. A. J. 37 (May 2008) (interview with JUSTICE SCALIA and Bryan Garner).

nity to reflect as judges; flooding the airwaves with slogans and sound bites may well do more to obscure the issues than to enlighten listeners. At least in the context of elections, the notion that rules limiting the quantity of speech are just as offensive to the First Amendment as rules limiting the content of speech is plainly incorrect.[3]

If, as I have come to believe, Congress could attempt to reduce the millionaire candidate's advantage by imposing reasonable limits on *all* candidates' expenditures, it follows *a fortiori* that the eminently reasonable scheme before us today survives constitutional scrutiny.

II

Even accepting the *Buckley* Court's holding that expenditure limits as such are uniquely incompatible with the First Amendment, it remains my firm conviction that the Millionaire's Amendment represents a good-faith attempt by Congress to regulate, within the bounds of the Constitution, one particularly pernicious feature of many contemporary political campaigns.[4]

It cannot be gainsaid that the twin rationales at the heart of the Millionaire's Amendment—reducing the importance of wealth as a criterion for public office and countering the per-

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[3]The Court is of course correct that "it would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech." *Ante*, at 743, n. 8. But campaign expenditures are not *themselves* "core political speech"; they merely may *enable* such speech (as well as its repetition *ad nauseam*). In my judgment, it is simply not the case that the First Amendment "provides the same measure of protection" to the use of money to enable speech as it does to speech itself. *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 398 (2000) (STEVENS, J., concurring).

[4]I note at the outset of this discussion, however, that I agree with the Court's conclusion that Davis has standing to challenge §§319(a) and (b), and that the case is not moot; I therefore join Part II of the Court's opinion.

ception that seats in the United States Congress are available for purchase by the wealthiest bidder—are important Government interests. It is also evident that Congress, in enacting the provision, crafted a solution that was carefully tailored to those concerns. Davis insists, however, that the Government's interests are insufficiently weighty to justify what he believes are intrusions upon his rights under the First Amendment and the equal protection component of the Fifth Amendment, and that, regardless of the strength of the justifications offered, Congress' solution is not sufficiently tailored to addressing the twin concerns it has identified. His arguments are unpersuasive on all counts.

A

The thrust of Davis' First Amendment challenge is that by relaxing the contribution limits applicable to the opponent of a self-funding candidate, the Millionaire's Amendment punishes the candidate who chooses to self-fund. Extrapolating from the zero-sum nature of a political race, Davis insists that any benefit conferred upon a self-funder's opponent thereby works a detriment to the self-funding candidate. Accordingly, he argues, the scheme burdens the self-funding candidate's First Amendment right to speak freely and to participate fully in the political process.

But Davis cannot show that the Millionaire's Amendment causes him—or any other self-funding candidate—any First Amendment injury whatsoever. The Millionaire's Amendment quiets no speech at all. On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard; this amplification in no way mutes the voice of the millionaire, who remains able to speak as loud and as long as he likes in support of his campaign. Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles. If only one candidate can make

himself heard, the voter's ability to make an informed choice is impaired.[5] And the self-funding candidate's ability to engage meaningfully in the political process is in no way undermined by this provision.[6]

Even were we to credit Davis' view that the benefit conferred on the self-funding candidate's opponent burdens the self-funder's First Amendment rights, the purposes of the amendment surely justify its effects. The Court is simply wrong when it suggests that the "governmental interest in eliminating corruption or the perception of corruption," *ante*, at 740, is the sole governmental interest sufficient to support campaign finance regulations. See *ante*, at 741–743. It is true, of course, that in upholding the Federal Election Campaign Act of 1971's (FECA) limits on the size of contributions to political campaigns, the *Buckley* Court held that preventing both actual corruption and the appearance of corruption were Government interests of sufficient weight that they justified any infringement upon First Amendment freedoms that resulted from FECA's contribution limits; the Court explained that, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern . . . is the impact of the appearance of corruption stemming from public awareness of the opportunities for

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[5] "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley* v. *Valeo*, 424 U. S. 1, 14–15 (1976) *(per curiam)*.

[6] The self-funder retains the choice to structure his campaign's funding as he pleases: He may choose to fund his own campaign subject to no limitations whatsoever and still accept limited donations from supporters; alternatively, he may forgo self-financing and rely on contributions alone, at the same level as his opponent. In neither event is his engagement in the political process in any sense impeded.

abuse inherent in a regime of large individual financial contributions." 424 U. S., at 26–27. It is also true that the Court found that same interest insufficient to justify FECA's expenditure limitations. *Id.*, at 45–46, 52–56. But it does not follow that the *Buckley* Court concluded that *only* the interest in combating corruption and the appearance of corruption can justify congressional regulation of campaign financing.

Indeed, we have long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results. In case after case, we have held that statutes designed to protect against the undue influence of aggregations of wealth on the political process—where such statutes are responsive to the identified evil—do not contravene the First Amendment. See, *e. g.*, *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 660 (1990) (upholding statute designed to combat "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas"); *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 257 (1986) ("Th[e] concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas. . . . Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace"); cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969) (upholding constitutionality of several components of the Federal Communications Commission's "fair coverage" requirements, and explaining that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which

truth will ultimately prevail, rather than to countenance monopolization of that market").

Although the focus of our cases has been on aggregations of corporate rather than individual wealth, there is no reason that their logic—specifically, their concerns about the corrosive and distorting effects of wealth on our political process—is not equally applicable in the context of individual wealth. For, as we explained in *McConnell*, "Congress' historical concern with the 'political potentialities of wealth' and their 'untoward consequences for the democratic process' . . . has long reached beyond corporate money," 540 U. S., at 116 (quoting *United States* v. *Automobile Workers*, 352 U. S. 567, 577–578 (1957)).

Minimizing the effect of concentrated wealth on our political process, and the concomitant interest in addressing the dangers that attend the perception that political power can be purchased, are, therefore, sufficiently weighty objectives to justify significant congressional action. And, not only was Congress motivated by proper and weighty goals in crafting the Millionaire's Amendment, the details of the scheme it devised are genuinely responsive to the problems it identified. The statute's "Opposition Personal Funds Amount" formula permits a self-funding candidate to spend as much money as he wishes, while taking into account fundraising by the relevant campaigns; it thereby ensures that a candidate who happens to enjoy a significant fundraising advantage against a self-funding opponent does not reap a windfall as a result of the enhanced contribution limits. Rather, the self-funder's opponent may avail himself of the enhanced contribution limits only until parity is achieved, at which point he becomes again ineligible for contributions above the normal maximum. See §§441a–1(a)(1)(A)–(C).

It seems uncontroversial that "there is no good reason to allow disparities in wealth to be translated into disparities in political power. A well-functioning democracy distinguishes

between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other." Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390 (1994). In light of that clear truth, Congress' carefully crafted attempt to reduce the distinct advantages enjoyed by wealthy candidates for congressional office does not offend the First Amendment.

B

Davis' equal protection argument, which the Court finds unnecessary to address, *ante*, at 744, n. 9, fares no better. He claims that by permitting only the self-funder's opponent to avail himself of the increased contribution limits, the statute creates an unwarranted disparity between the self-funder and his opponent. But, as we explained in *McConnell*, "Congress is fully entitled to consider . . . real-world differences . . . when crafting a system of campaign finance regulation." 540 U. S., at 188. And *Buckley* itself acknowledged, in the course of upholding FECA's public financing scheme, that "the Constitution does not require Congress to treat all declared candidates the same." 424 U. S., at 97. It blinks reality to contend that the millionaire candidate is situated identically to a nonmillionaire opponent, and Congress was under no obligation to indulge any such fiction. Accordingly, Davis has failed to establish that he was deprived of the equal protection guarantees of the Fifth Amendment.

III

In sum, I share Judge Wright's view that nothing in the Constitution "prevents us, as a political community, from making certain modest but important changes in the kind of process we want for selecting our political leaders," Wright, Politics and the Constitution: Is Money Speech? 85 Yale L. J. 1001, 1005 (1976). In my judgment, the Millionaire's Amendment represents just such a change. I therefore respectfully dissent.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring in part and dissenting in part.

Agreeing with the Court that appellant Jack Davis has standing and that this case is not moot, I join Part II of the Court's opinion. On the merits, however, I part ways with the Court. The District Court's careful and persuasive opinion, as I see it, correctly concluded that the provisions challenged in this case are entirely consistent with *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, and all other relevant decisions of this Court. I therefore join Part II of JUSTICE STEVENS' opinion.

I resist joining other portions of JUSTICE STEVENS' opinion, however, to the extent that they address *Buckley*'s distinction between expenditure and contribution limits and, correspondingly, *Buckley*'s holding that expenditure limits impose "direct quantity restrictions on political communication," *id.*, at 18. Appellee Federal Election Commission has not asked us to overrule *Buckley;* consequently, the issue has not been briefed. Convinced that the challenged statute encounters no constitutional shoal under our precedents, I would leave reconsideration of *Buckley* for a later day and case.

Per Curiam

MEDELLIN *v.* TEXAS

ON APPLICATION TO RECALL AND STAY MANDATE AND FOR STAY

No. 06–984 (08A98). Decided August 5, 2008*

Petitioner seeks a writ of habeas corpus and to recall and stay the mandate and to stay his execution on the theory that either Congress or the Texas Legislature might determine that International Court of Justice (ICJ) actions should be given controlling weight in determining that a Vienna Convention on Consular Relations violation is grounds for vacating his sentence.

Held: The applications and petition for a writ of habeas corpus are denied. Under settled principles, the possibility of congressional or state legislative intervention is too remote to justify a stay, especially given that Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since this Court ruled in *Medellín* v. *Texas*, 552 U. S. 491. That petitioner's confession was unlawfully obtained under domestic or international law, the beginning premise for any stay, is highly unlikely. And petitioner's other arguments seeking to establish that a Convention violation constitutes grounds for invalidating the state-court judgment are insubstantial.

Applications and petition for writ of habeas corpus denied.

PER CURIAM.

Petitioner seeks a stay of execution on the theory that either Congress or the Legislature of the State of Texas might determine that actions of the International Court of Justice (ICJ) should be given controlling weight in determining that a violation of the Vienna Convention on Consular Relations is grounds for vacating the sentence imposed in this suit. Under settled principles, these possibilities are too remote to justify an order from this Court staying the sentence imposed by the Texas courts. And neither the

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*Together with No. 08–5573 (08A99), *Medellín* v. *Texas*, on application for stay and on petition for a writ of certiorari to the Court of Criminal Appeals of Texas, and No. 08–5574 (08A99), *In re Medellín*, on application for stay and on petition for a writ of habeas corpus.

President nor the Governor of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action.

It is up to Congress whether to implement obligations undertaken under a treaty which (like this one) does not itself have the force and effect of domestic law sufficient to set aside the judgment or the ensuing sentence, and Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling in *Medellín* v. *Texas*, 552 U. S. 491 (2008). This inaction is consistent with the President's decision in 2005 to withdraw the United States' accession to jurisdiction of the ICJ with regard to matters arising under the Convention.

The beginning premise for any stay, and indeed for the assumption that Congress or the legislature might seek to intervene in this suit, must be that petitioner's confession was obtained unlawfully. This is highly unlikely as a matter of domestic or international law. Other arguments seeking to establish that a violation of the Convention constitutes grounds for showing the invalidity of the state-court judgment, for instance because counsel was inadequate, are also insubstantial, for the reasons noted in our previous opinion. *Id.*, at 502, n. 1.

The Department of Justice of the United States is well aware of these proceedings and has not chosen to seek our intervention. Its silence is no surprise: The United States has not wavered in its position that petitioner was not prejudiced by his lack of consular access.

The application to recall and stay the mandate and for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, is denied. The application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, is denied. The petition for a writ of habeas corpus is denied.

It is so ordered.

JUSTICE STEVENS, dissenting.

Earlier this Term, in *Medellín* v. *Texas*, 552 U. S. 491 (2008), we concluded that neither the President nor the International Court of Justice (ICJ) has the authority to require Texas to determine whether its violation of the Vienna Convention prejudiced petitioner. Although I agreed with the Court's judgment, I wrote separately to make clear my view that Texas retained the authority—and, indeed, the duty as a matter of international law—to remedy the potentially significant breach of the United States' treaty obligations identified in the President's Memorandum to the Attorney General. Because it appears that Texas has not taken action to address the serious national security and foreign policy implications of this suit, I believe we should request the views of the Solicitor General, who argued on behalf of the Executive Branch in earlier proceedings in the suit, before allowing Texas to proceed with the execution.

As I explained in my separate opinion in March, the cost to Texas of complying with the ICJ judgment "would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced" this petitioner. *Id.*, at 536 (opinion concurring in judgment). "On the other hand, the costs of refusing to respect the ICJ's judgment are significant. The entire Court and the President agree that breach will jeopardize the United States' 'plainly compelling' interests in 'ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.'" *Id.*, at 537. Given these stakes, and given that petitioner has been under a death sentence for 14 years, waiting a short time to guarantee that the views of the Executive have been given respectful consideration is only prudent. Balancing the honor of the Nation against the modest burden of a short delay to ensure that the breach is

unavoidable convinces me that the application for a stay should be granted.

Accordingly, I respectfully dissent.

JUSTICE SOUTER, dissenting.

I joined the dissent in *Medellín* v. *Texas*, 552 U. S. 491, 538 (2008) (opinion of BREYER, J.), and invoke the rule that it is reasonable to adhere to a dissenting position throughout the Term of Court in which it was announced. See *North Carolina* v. *Pearce*, 395 U. S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part). The only chance to apply the treaty provisions the dissent would have held presently enforceable is now through action by the other branches of the Government. A bill on the subject has been introduced in the Congress, Avena Case Implementation Act of 2008, H. R. 6481, 110th Cong., 2d Sess. (2008), and the Government has represented to the International Court of Justice it will take further steps to give effect to that court's judgment pertinent to Medellín's conviction, among others, *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U. S.)*, 2008 I. C. J. No. 139, ¶37 (Order of July 16). I would therefore enter the requested stay of execution for as long as the remainder of the 2007 Term, to allow for a current statement of the views of the Solicitor General and for any congressional action that could affect the disposition of petitioner's filings. I would defer action on the petition for a writ of certiorari to the Court of Criminal Appeals of Texas, the petition for an original writ of habeas corpus, and the motion to recall and stay the mandate in *Medellín* v. *Texas*, *supra*.

JUSTICE GINSBURG, dissenting.

I would grant the application for a stay of execution. Before the International Court of Justice, in response to Mexico's request for provisional measures, the United States rep-

resented: "[C]ontrary to Mexico's suggestion, the United States [does] not believe that it need make no further effort to implement this Court's *Avena* Judgment, and . . . would 'continue to work to give that Judgment full effect, including in the case of Mr. Medellín.'" *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2008 I. C. J. No. 139, ¶ 37 (Order of July 16). I would invite the Solicitor General's clarification of that representation very recently made to the international tribunal. Pending receipt and consideration of the Solicitor General's response, I would defer action on Medellín's submissions.

JUSTICE BREYER, dissenting.

The International Court of Justice (ICJ) has held that a treaty that the United States has signed, namely, the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, [1970] 21 U. S. T. 77, T. I. A. S. No. 6820, does not permit execution of this defendant without a further hearing concerning whether Texas' violation of the Vienna Convention's obligation to notify the defendant of his right to consult Mexico's consul constituted harmless error. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. 61–64 (Judgt. of Mar. 31). The United States has agreed that the ICJ's judgments will have "binding force . . . between the parties and in respect of [a] particular case." United Nations Charter, Art. 59, 59 Stat. 1062, T. S. No. 993 (1945). The President of the United States has concluded that domestic courts should enforce this particular ICJ judgment. Memorandum to the Attorney General (Feb. 28, 2005), App. to Pet. for Cert. in No. 06–984, p. 187a.

In *Medellín* v. *Texas*, 552 U. S. 491 (2008) (6-to-3 vote), this Court, while recognizing that the United States was bound by treaty to follow the ICJ's determination as a matter of *international* law, held that that determination did not *automatically* bind the courts of the United States as a matter

of *domestic law* in the absence of further congressional legislation. *Id.*, at 504–519. In reaching this conclusion the majority, as well as the dissent, recognized that, without the further hearing that the ICJ found necessary, the execution would violate our international treaty commitments. See *id.*, at 504; *id.*, at 538–540 (opinion of BREYER, J.).

Petitioner, who is scheduled to be executed this evening, now asks us to delay the execution in order to give Congress an opportunity to act to cure the legal defect that the Court found in *Medellín*. In my view, several factors counsel in favor of delay. *First*, since this Court handed down *Medellín*, Mexico has returned to the ICJ requesting this Nation's compliance with its international obligations; and the ICJ has asked that the United States "take all measures necessary to ensure that [the Mexican nationals] are not executed" unless and until they "receive review and reconsideration consistent" with the ICJ's earlier *Avena* decision. See *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2008 I. C. J. No. 139, ¶ 80 (Order of July 16).

Second, legislation has been introduced in Congress seeking to provide the legislative approval necessary to transform our international legal obligations into binding domestic law. See Avena Case Implementation Act of 2008, H. R. 6481, 110th Cong., 2d Sess. (2008) (referred to committee, July 14, 2008).

Third, prior to *Medellín*, Congress may not have understood the legal need for further legislation of this kind. That fact, along with the approaching election, means that more than a few days or weeks are likely necessary for Congress to determine whether to enact the proposed legislation.

Fourth, to permit this execution to proceed forthwith places the United States irremediably in violation of international law and breaks our treaty promises.

Fifth, the President of the United States has emphasized the importance of carrying out our treaty-based obligations in this case; this fact, along with the President's responsibility for foreign affairs, makes the Executive's views of the matter pertinent.

Sixth, different Members of this Court seem to have very different views of what this case is about. In my view, the issue in this suit—what the majority describes as the "beginning premise"—is not whether a confession was unlawfully obtained from petitioner. Cf. *ante*, at 760. Rather, the question before us is whether the United States will carry out its international legal obligation to enforce the decision of the ICJ. That decision requires a further hearing to determine whether a conceded violation of the Vienna Convention (Texas' failure to inform petitioner of his rights under the Vienna Convention) was or was not harmless. Nor do I believe the majority is correct insofar as it implies that Congress has had *four years to consider the matter*. See *ibid.* ("Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling in *Medellín* v. *Texas*"). To the contrary, until this Court's decision in *Medellín* a few months ago, a Member of Congress might reasonably have believed there was no need for legislation because the relevant treaty provisions were self-executing. It is not realistic to believe Congress could act to provide the necessary legislative approval in only a few weeks' time.

In my view, we should seek the views of the Solicitor General (which may well clarify these matters), and we should grant a stay of sufficient length for careful consideration of those views, along with the other briefs and materials filed in this suit. A sufficient number of Justices having voted to secure those views (four), it is particularly disappointing that no Member of the majority has proved willing to provide a courtesy vote for a stay so that we can consider the Solicitor General's view once received. As it is, the request will be

mooted by petitioner's execution, which execution, as I have said, will place this Nation in violation of international law.

For the reasons set forth, I respectfully dissent.

Reporter's Note

The next page is purposely numbered 901. The numbers between 766 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 16 THROUGH OCTOBER 3, 2008

JUNE 16, 2008

Certiorari Granted—Vacated and Remanded

No. 07–1283. BROWN ET AL. *v.* CASSENS TRANSPORT CO. ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639 (2008). Reported below: 492 F. 3d 640.

No. 07–9713. LOPEZ-MORALES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 256 Fed. Appx. 726;

No. 07–9769. JAIMES-AGUIRRE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 258 Fed. Appx. 662; and

No. 07–9855. SALAZAR-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 258 Fed. Appx. 661. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Gall* v. *United States*, 552 U. S. 38 (2007).

Miscellaneous Orders

No. 07–1152. WELDON ET AL. *v.* NORFOLK SOUTHERN RAILWAY CO. Sup. Ct. Ohio. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 07–9985. IN RE XIANGYUAN ZHU. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [553 U. S. 1017] denied.

No. 07–11025. IN RE CARBIN. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 07–10553. IN RE GINCO. Petition for writ of mandamus denied.

Certiorari Granted

No. 07–1015. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL. *v.* IQBAL ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 490 F. 3d 143.

No. 07–1209. PEAKE, SECRETARY OF VETERANS AFFAIRS *v.* SANDERS (Reported below: 487 F. 3d 881); and PEAKE, SECRETARY OF VETERANS AFFAIRS *v.* SIMMONS (487 F. 3d 892). C. A. Fed. Cir. Certiorari granted.

No. 07–10374. HAYWOOD *v.* DROWN ET AL. Ct. App. N. Y. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 9 N. Y. 3d 481, 881 N. E. 2d 180.

Certiorari Denied

No. 07–962. CAVEL INTERNATIONAL, INC. *v.* MADIGAN, ATTORNEY GENERAL OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 500 F. 3d 544.

No. 07–991. MOMAH *v.* EARP, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 239 Fed. Appx. 114.

No. 07–1061. ESTATE OF THOMPSON, DECEASED, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 499 F. 3d 129.

No. 07–1075. DUPUY ET AL. *v.* MCEWEN, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 3d 807.

No. 07–1079. ADEDUNTAN ET AL. *v.* HOSPITAL AUTHORITY OF CLARKE COUNTY, DBA ATHENS REGIONAL MEDICAL CENTER, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 249 Fed. Appx. 151.

No. 07–1082. BAKER *v.* CHISOM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 501 F. 3d 920.

No. 07–1110. JOHNSON *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 505 F. 3d 1128.

No. 07–1161. CARTER, SHERIFF, MOORE COUNTY, NORTH CAROLINA, ET AL. *v.* MASSASOIT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 295.

No. 07–1169. RANGOLAN *v.* MUKASEY, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied.

No. 07–1175. BURKE ET AL. *v.* BROOKLINE SCHOOL DISTRICT. C. A. 1st Cir. Certiorari denied. Reported below: 257 Fed. Appx. 335.

No. 07–1181. POINT REYES SEASHORE LODGE ET AL. *v.* DELIL. C. A. 9th Cir. Certiorari denied. Reported below: 254 Fed. Appx. 633.

No. 07–1276. JENKINS *v.* LIFETIME HOAN CORP. C. A. 7th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 863.

No. 07–1278. DAHLQUIST *v.* VUKICH. Ct. App. Wash. Certiorari denied.

No. 07–1279. CURNIN ET VIR *v.* TOWN OF EGREMONT, MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 510 F. 3d 24.

No. 07–1285. ADAMS ET AL. *v.* BRINK'S CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 583.

No. 07–1290. SADLER ET UX. *v.* HINE ET UX. Ct. App. N. M. Certiorari denied.

No. 07–1292. BORNHORST ET AL. *v.* HARRIS. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 3d 503.

No. 07–1293. NILSSEN ET AL. *v.* OSRAM SYLVANIA, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 504 F. 3d 1223.

No. 07–1299. WEINBERGER ET AL. *v.* TUCKER. C. A. 4th Cir. Certiorari denied. Reported below: 510 F. 3d 486.

No. 07–1300. MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION *v.* DILLON. C. A. 4th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 577.

No. 07–1306. NIKOLBIBAJ ET AL. *v.* MUKASEY, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 232 Fed. Appx. 546.

No. 07–1307. WARE *v.* OREGON DEPARTMENT OF HUMAN SERVICES. Ct. App. Ore. Certiorari denied. Reported below: 213 Ore. App. 391, 161 P. 3d 955.

No. 07–1312. ROSA *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 918.

No. 07–1314. KIM *v.* WASHINGTON STATE DEPARTMENT OF LICENSING. C. A. 9th Cir. Certiorari denied.

No. 07–1324. DURKIN *v.* MUKASEY, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 12.

No. 07–1335. WORDLAW *v.* OREGON DEPARTMENT OF CORRECTIONS ET AL. Ct. App. Ore. Certiorari denied. Reported below: 214 Ore. App. 570, 166 P. 3d 606.

No. 07–1342. RUSSELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 07–1349. SCOTT *v.* MERCIER, DEPUTY SHERIFF, BRANTLEY COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 268 Fed. Appx. 872.

No. 07–1369. ELEY *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. 8th Cir. Certiorari denied. Reported below: 247 Fed. Appx. 852.

No. 07–1378. GOZA *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 07–1379. MAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–1403. WALLACE *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 66 M. J. 5.

No. 07–1406. WAGSTAFF *v.* DEPARTMENT OF EDUCATION. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 3d 661.

No. 07–1419. BRAQUET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 316 Fed. Appx. 345.

No. 07–1423. ISSA, AKA HABIB, ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 801.

No. 07–1426. VALENTINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 488 F. 3d 325.

No. 07–1439. CRAIG ET AL. *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. Reported below: 930 A. 2d 946.

No. 07–1449. COEN *v.* COEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 509 F. 3d 900.

No. 07–9108. COPENING, AKA CARPENTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 506 F. 3d 1241.

No. 07–9112. RYLAND *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 967 So. 2d 204.

No. 07–9425. GOLDBERG *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 282 Ga. 542, 651 S. E. 2d 667.

No. 07–9435. MINA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 437.

No. 07–9512. BOCKTING *v.* BAYER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 505 F. 3d 973.

No. 07–9606. MILLER *v.* BERKEBILE, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 07–9906. ANGELLO *v.* NORTHERN MARIANAS COLLEGE. Sup. Ct. N. Mar. I. Certiorari denied.

No. 07–10330. FISHER *v.* NEW YORK. County Ct., Nassau County, N. Y. Certiorari denied.

No. 07–10342. GUITERREZ *v.* FORNISS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–10347. DAVALOS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10348. CAIN *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 07–10350. SAVAGE *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 645.

No. 07–10352. ZAMORA *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 90.

No. 07–10361. VANDERWALL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 07–10366. BULLOCK *v.* LEAKE. Ct. App. D. C. Certiorari denied. Reported below: 936 A. 2d 836.

No. 07–10369. ANDERSON *v.* PAYNE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 743.

No. 07–10370. BOYD *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10372. ALLEN *v.* CITY OF ROCHESTER, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 07–10396. KESZTHELYI *v.* ISSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 07–10397. LEWIS *v.* WASHINGTON COUNTY HEALTH DEPARTMENT ET AL. Ct. App. Ind. Certiorari denied. Reported below: 868 N. E. 2d 1216.

No. 07–10403. MASON *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10404. JONES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–10406. JOHNSON *v.* ERCOLE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 07–10407. CORNET *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 915 So. 2d 239.

No. 07–10413. LAWRENCE *v.* SUTTON, CORRECTIONAL ADMINISTRATOR I, PASQUOTANK CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 271 Fed. Appx. 316.

No. 07–10418. BEA *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 268 Fed. Appx. 262.

No. 07–10425. GIBBS *v.* MINNER, GOVERNOR OF DELAWARE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 271 Fed. Appx. 243.

No. 07–10431. WILLIAMS *v.* ALAMEDA COUNTY SHERIFF DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 961.

No. 07–10438. SAVAGE *v.* PEARSON, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 07–10520. JACKSON *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 245.

No. 07–10527. RISKIN *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 143 Cal. App. 4th 234, 49 Cal. Rptr. 3d 287.

No. 07–10548. WHIGHAM *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 975 So. 2d 430.

No. 07–10678. PATTON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 07–10706. KUEHNE *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 07–10714. WEYGANT *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 07–10757. CUMMINGS *v.* SIRMONS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 506 F. 3d 1211.

No. 07–10805. WILSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 07–10930. GRAHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 79.

No. 07–10931. FLORES-NAVARRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 830.

No. 07–10932. HEADEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 264 Fed. Appx. 244.

No. 07–10937. ZARAZUA-ALEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 386.

No. 07–10939. LOPEZ-LOPEZ *v.* SANDERS, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 15.

No. 07–10941. PUGH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 273 Fed. Appx. 449.

No. 07–10944. ABBOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 307.

No. 07–10946. OLIVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 912.

No. 07–10947. PARKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 07–10948. CANTU-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 334.

No. 07–10949. MEDINA CASTENEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 511 F. 3d 1246.

No. 07–10954. HILL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 930 A. 2d 267.

No. 07–10956. GAYNOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 262 Fed. Appx. 341.

No. 07–10959. HOWTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 813.

No. 07–10960. HARRISON *v.* LINDSAY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 07–10965. ACEVES FLORES, AKA LOPEZ-ARIAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 260 Fed. Appx. 481.

No. 07–10967. ROGERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 264 Fed. Appx. 236.

No. 07–10968. SNYDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 511 F. 3d 813.

No. 07–10976. LAMPERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 275 Fed. Appx. 703.

No. 07–10986. VARGAS TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 683.

No. 07–10989. CARLISLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 827.

No. 07–10990. MORTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10991. MORALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 585.

No. 07–10999. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 341.

No. 07–11007. BRUCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 07–11010. ANGEL-POSADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 379.

No. 07–11020. BUTLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 150.

No. 07–11021. BAILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 480.

No. 07–11026. COLEMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 276 Fed. Appx. 766.

No. 07–81. EXXON MOBIL CORP. ET AL. *v.* DOE ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 473 F. 3d 345.

No. 07–539. PROGRESS ENERGY, INC. *v.* TAYLOR. C. A. 4th Cir. Motion of North Carolina Retail Merchants Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 493 F. 3d 454.

No. 07–1329. QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION *v.* CHAMBERS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 260 Fed. Appx. 706.

No. 07–1338. CINTAS CORP. *v.* ABEL ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 07–9358. MATHIS *v.* WACHOVIA BANK. C. A. 11th Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 255 Fed. Appx. 425.

Rehearing Denied

No. 07–8706. JOHNSON *v.* KEEBLER-SUNSHINE BISCUITS, INC., AKA KEEBLER CO., 552 U. S. 1264;

No. 07–8841. SATCHEL *v.* SCHOOL BOARD OF HILLSBORO COUNTY, 552 U. S. 1315;

No. 07–9020. VALENTINE *v.* BURTT, WARDEN, 552 U. S. 1298;

No. 07–9067. ARZAGA *v.* CAMPBELL, WARDEN, 552 U. S. 1299;

No. 07–9261. IN RE SHABAZZ, 552 U. S. 1308;

No. 07–9348. RANES *v.* OVERTON, 552 U. S. 1320;

No. 07–9349. ROGERS *v.* WOOLDRIDGE ET AL., 552 U. S. 1321;

No. 07–9552. ELLIS *v.* VIRGINIA, 553 U. S. 1009;

No. 07–9767. LIMA *v.* FLORIDA, 553 U. S. 1022;

No. 07–10098. SPRATT *v.* UNITED STATES, 553 U. S. 1025;

No. 07–10117. SPELLS *v.* CITY OF NEW YORK, NEW YORK, 553 U. S. 1025; and

No. 07–10238. IN RE ROSE, 553 U. S. 1017. Petitions for rehearing denied.

No. 07–7965. ELLIOTT *v.* CHURCH OF SCIENTOLOGY INTERNATIONAL ET AL., 552 U. S. 1193; and

No. 07–8554. DIAZ *v.* GREEN ET AL., 552 U. S. 1246. Motions for leave to file petitions for rehearing denied.

JUNE 17, 2008

Miscellaneous Order

No. 07–11406 (07A992). IN RE HOOD. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 07–11423 (07A995). HOOD *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 281 Fed. Appx. 394.

No. 07–11452 (07A1004). HOOD *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JUNE 20, 2008

Miscellaneous Order

No. 07A1021. REED *v.* OZMINT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JUNE 23, 2008

Certiorari Granted—Vacated and Remanded

No. 07–153. PARACHA *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir.; and

No. 07–416. ZALITA *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Boumediene* v. *Bush*, 553 U. S. 723 (2008).

No. 07–495. EDDY ET AL. *v.* WAFFLE HOUSE, INC. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Taylor* v. *Sturgell*, 553 U. S. 880 (2008).

No. 07–818. NUNEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed May 12, 2008. Reported below: 495 F. 3d 544.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Petitioner pleaded guilty to federal narcotics offenses and waived appellate and collateral-review rights. Despite that waiver, he demanded (the Court of Appeals assumed) that his attorney file a notice of appeal; his attorney refused. Petitioner sought habeas relief, claiming that this failure was ineffective assistance of counsel. See 495 F. 3d 544, 545 (CA7 2007). The District Court denied relief, and the Court of Appeals affirmed, finding that petitioner had waived his right to raise even the

ineffective-assistance claim on collateral review. See *id.*, at 546, 548–549. Petitioner has filed a petition for a writ of certiorari, asking us to consider the ineffective-assistance claim. The Government argues in response that the question is not presented because the Court of Appeals' opinion rests on petitioner's collateral-review waiver. I agree with that response, and so would deny the petition for writ of certiorari.

Yet the Government urges us to GVR—to grant the petition, vacate the judgment, and remand the case to the Court of Appeals—because it believes that the Court of Appeals misconstrued the scope of petitioner's collateral-review waiver. A majority of the Court agrees to that course. I do not. In my view we have no power to set aside (vacate) another court's judgment unless we find it to be in error. See *Mariscal* v. *United States*, 449 U. S. 405, 407 (1981) (Rehnquist, J., dissenting). Even so, I have reluctantly acquiesced in our dubious yet well-entrenched habit of entering a GVR order *without an independent examination of the merits* when the Government, as respondent, confesses error in the judgment below. See *Lawrence* v. *Chater*, 516 U. S. 163, 182–183 (1996) (SCALIA, J., dissenting). But because "we have no *power* to vacate a judgment that has not been shown to be (or been conceded to be) in error," *Price* v. *United States*, 537 U. S. 1152, 1153 (2003) (SCALIA, J., dissenting), I continue to resist GVR disposition when the Government, without conceding that a *judgment* is in error, merely suggests that the lower court's *basis* for the judgment is wrong, see *Lawrence*, *supra*, at 183, and n. 3 (dissenting opinion); cf. *Alvarado* v. *United States*, 497 U. S. 543, 545 (1990) (Rehnquist, C. J., dissenting). That describes this case. The Government's brief is entirely agnostic on the correctness of the Court of Appeals' judgment—*i. e.*, its affirmance of the District Court's denial of habeas relief. Presumably, the Government believes the judgment is correct; it asked the Court of Appeals to affirm the District Court's judgment the first time around, and presumably will do the same on remand.

To make matters worse, the Government's suggestion that the Court of Appeals erred in construing the scope of petitioner's waiver is not even convincing. The collateral-review waiver in petitioner's plea agreement is inartfully worded; it is perhaps susceptible of the Government's reading, but in my view the Court of Appeals' reading is better. In any event, during his plea colloquy

petitioner orally agreed to a collateral-review waiver precisely in line with the Court of Appeals' position. Compare Brief for United States 3–4 (plea colloquy) with *id.*, at 16–17 (plea agreement). It is bad enough to upend the judgment of a lower court because the Solicitor General, while not saying the judgment was wrong, opines that the expressed basis for it was wrong; it is absurd to do this when the Solicitor General's gratuitous opinion is dubious on its face.

Finally, we should be especially reluctant to GVR on the Solicitor General's say-so when, if that say-so *is* correct, the likely consequence will be to create a conflict among the Courts of Appeals. Before resting its judgment on petitioner's collateral-review waiver, the Court of Appeals expressed its unfavorable view of petitioner's ineffective-assistance claim, recognizing, however, that its view contradicted the view of at least six other Courts of Appeals. See 495 F. 3d, at 546–548. If, on remand, the Court of Appeals agrees with the Solicitor General that petitioner's collateral-review waiver does not preclude his claim, the court in all likelihood will enter the same judgment by rejecting petitioner's ineffective-assistance claim, thereby creating (absent reversal en banc) a split with those other courts. I had thought that the main purpose of our certiorari jurisdiction was to eliminate circuit splits, not to create them.

For all these reasons, I respectfully dissent from the Court's order.

No. 07–1054 (07A677). GATES, SECRETARY OF DEFENSE, ET AL. *v.* BISMULLAH ET AL. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Boumediene* v. *Bush*, 553 U. S. 723 (2008). Reported below: 501 F. 3d 178.

No. 07–9267. STEPHENSON *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed May 12, 2008.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Petitioner pleaded guilty to distributing crack cocaine. He waived "'all appellate issues that might have been available if he had exercised his right to trial'" but reserved the right to appeal the validity of his guilty plea. See No: 06C1304, Memorandum Opinion and Order (ND Ill., May 2, 2006), App. B to Pet. for Cert. 3–4. Petitioner nonetheless (allegedly) asked his attorney to file a notice of appeal to argue that the substance he distributed was not crack cocaine. His attorney filed nothing. On collateral review, petitioner claimed that his attorney's failure was ineffective assistance of counsel. The District Court denied the claim, finding that any appeal his attorney might have pursued was doomed because he waived his right to appeal and because petitioner had expressly identified the substance as crack cocaine in his guilty plea. On appeal, the Court of Appeals asked the parties to address the effect of its decision in *Nunez* v. *United States*, 495 F. 3d 544 (CA7 2007), which held that Nunez's plea agreement waived his right to bring an identical ineffective-assistance claim on collateral review. The Government argued that petitioner's case was materially indistinguishable from *Nunez*. The Court of Appeals summarily affirmed the District Court's judgment.

Petitioner asks us to consider his ineffective-assistance claim. That claim does not warrant our review, so I would deny his petition for certiorari. In the Brief for United States, the Solicitor General suggests that we GVR—grant the petition, vacate the judgment, and remand the case to the Court of Appeals. He contends (contrary to the Government's position below) that petitioner's waiver is less comprehensive than the waiver in *Nunez*. And since he thinks that the Court of Appeals' reading of the waiver in *Nunez* was wrong (he has asked us to GVR in Nunez's case for that very reason), the Solicitor General concludes that, inasmuch as the Court of Appeals might have agreed with the Government's (now repudiated) position below, the reasoning behind the judgment below may be wrong. The Solicitor General does not challenge the *judgment* below, nor does he take a position on petitioner's ineffective-assistance claim, insofar as that may have been the basis for the Court of Appeals' summary order.

As I state in my dissent in *Nunez* v. *United States*, *ante*, at 912, the Solicitor General's confession of error in the Court of Appeals'

reasoning, but not its judgment, does not justify entry of a GVR order. That disposition is especially inappropriate in this case because we cannot even be sure that the Court of Appeals' summary order was premised on the alleged error. See *Lawrence* v. *Chater*, 516 U. S. 163, 184–186 (1996) (SCALIA, J., dissenting). For all we know, the Court of Appeals identified a difference in the plea agreements and therefore summarily affirmed because it agreed with the District Court's reasoning on the merits of petitioner's ineffective-assistance claim.

I respectfully dissent.

Certiorari Granted—Remanded

No. 06–1039. ESTATE OF ROXAS ET AL. *v.* PIMENTEL, TEMPORARY ADMINISTRATOR OF THE ESTATE OF PIMENTEL, DECEASED, ET AL. C. A. 9th Cir. The Court reversed the judgment below in *Republic of Philippines* v. *Pimentel*, 553 U. S. 851 (2008). Therefore, certiorari granted, and case remanded for further proceedings. Reported below: 464 F. 3d 885.

Certiorari Dismissed

No. 07–10445. FLETCHER *v.* BOARD OF PROFESSIONAL RESPONSIBILITY. Sup. Ct. Tenn. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 07–10486. TEDDER *v.* CULLIVER, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 07A938. GARDNER, DBA BETHEL ARAM MINISTRIES, ET AL. *v.* UNITED STATES. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 07M71. SABAN *v.* DEPARTMENT OF LABOR; and

No. 07M72. SOROKINA *v.* MOODY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 07–9241. IN RE MONTFORD. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [552 U. S. 1309] denied.

No. 06–1194. IN RE ALI; and

No. 07–6827. IN RE AL-GHIZZAWI. Petitions for writs of habeas corpus denied without prejudice. Petitioners are free to file habeas corpus petitions in an appropriate district court with jurisdiction over the matters.

No. 07–11154. IN RE ADAMS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 07–1394. IN RE BELL; and

No. 07–10468. IN RE EMERSON. Petitions for writs of mandamus denied.

Certiorari Granted

No. 07–512. PACIFIC BELL TELEPHONE CO., DBA AT&T CALIFORNIA, ET AL. *v.* LINKLINE COMMUNICATIONS, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 503 F. 3d 876.

No. 07–543. AT&T CORP. *v.* HULTEEN ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 498 F. 3d 1001.

No. 07–615. MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN *v.* ELAHI. C. A. 9th Cir. Certiorari granted. Reported below: 495 F. 3d 1024.

No. 07–1114. CONE *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari granted. Reported below: 492 F. 3d 743.

No. 07–1239. WINTER, SECRETARY OF THE NAVY, ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 518 F. 3d 658.

No. 07–1122. ARIZONA *v.* JOHNSON. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 217 Ariz. 58, 170 P. 3d 667.

No. 07–8521. HARBISON *v.* BELL, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 503 F. 3d 566.

Certiorari Denied

No. 06–610. MOORANI *v.* MUKASEY, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 182 Fed. Appx. 352.

No. 06–1285. DEKOLADENU *v.* MUKASEY, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 459 F. 3d 500.

No. 06–1381. MEJIA-HUERTA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 3d 713.

No. 06–8085. MEYER, AKA SALEM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 452 F. 3d 998.

No. 06–8346. O'ROURKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 194 Fed. Appx. 814.

No. 06–8481. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 188 Fed. Appx. 274.

No. 07–259. IOURI ET UX. *v.* MUKASEY, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 3d 76.

No. 07–270. BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK *v.* GULINO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 3d 361.

No. 07–373. CLARK COUNTY, NEVADA *v.* VACATION VILLAGE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 497 F. 3d 902.

No. 07–593. JIAHUA HUANG ET AL. *v.* MUKASEY, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 235 Fed. Appx. 260.

No. 07–618. GOSS INTERNATIONAL CORP. *v.* TOKYO KIKAI SEISAKUSHO ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 491 F. 3d 355.

No. 07–867. NATIONAL PARKS CONSERVATION ASSN. ET AL. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 11th Cir. Certiorari denied. Reported below: 502 F. 3d 1316.

No. 07–1074. STEWART ET AL. *v.* MARTIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 499 F. 3d 360.

No. 07–1116. CINTORA AGUILAR *v.* MUKASEY, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 07–1124. GREEN ET AL. *v.* CHILTON COUNTY COMMISSION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 495 F. 3d 1324.

No. 07–1180. DEFENDERS OF WILDLIFE ET AL. *v.* CHERTOFF, SECRETARY OF HOMELAND SECURITY. D. C. D. C. Certiorari denied. Reported below: 527 F. Supp. 2d 119.

No. 07–1190. BROWNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 505 F. 3d 1229.

No. 07–1193. DAY ET AL. *v.* BOND, CHAIRMAN OF THE KANSAS BOARD OF REGENTS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 500 F. 3d 1127.

No. 07–1194. HENLEY *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 3d 379.

No. 07–1195. MOSES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 496 F. 3d 984.

No. 07–1207. MCCRAY *v.* PEE DEE REGIONAL TRANSPORTATION AUTHORITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 301.

No. 07–1215. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 269.

No. 07–1286. W. R. GRACE & CO. *v.* UNITED STATES; and
No. 07–1287. ESCHENBACH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 3d 745.

No. 07–1305. CITY AND COUNTY OF HONOLULU, HAWAII *v.* MATSUDA, TRUSTEE OF THE SALLY A. MATSUDA SELF-TRUSTED TRUST DATED OCTOBER 15, 1993, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 512 F. 3d 1148.

No. 07–1308. THOMAS *v.* LOUISIANA ATTORNEY DISCIPLINARY BOARD. Sup. Ct. La. Certiorari denied. Reported below: 973 So. 2d 686.

No. 07–1311. RASK *v.* FRESENIUS MEDICAL CARE NORTH AMERICA. C. A. 8th Cir. Certiorari denied. Reported below: 509 F. 3d 466.

No. 07–1320. ST. TAMMANY PARISH, LOUISIANA *v.* OMNI PINNACLE, L. L. C., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 3d 476.

No. 07–1321. REGELIN *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 243 Fed. Appx. 156.

No. 07–1326. CHI-MING CHOW *v.* MICHIGAN ATTORNEY GRIEVANCE COMMISSION. Sup. Ct. Mich. Certiorari denied.

No. 07–1332. WARE ET AL. *v.* FEDERAL HIGHWAY ADMINISTRATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 838.

No. 07–1333. TSG WATER RESOURCES, INC., ET AL. *v.* D'ALBA & DONOVAN CERTIFIED PUBLIC ACCOUNTANTS, P. C. C. A. 11th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 191.

No. 07–1343. DIBBS *v.* ROLDAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 256 Fed. Appx. 387.

No. 07–1353. DOLAN *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 514 F. 3d 587.

No. 07–1360. PRITCHARD *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 267 Fed. Appx. 6.

No. 07–1364. GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES *v.* J. G., AKA J. M. G., AKA J. M. S. Ct. App. N. C. Certiorari denied. Reported below: 186 N. C. App. 496, 652 S. E. 2d 266.

No. 07–1377. CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA *v.* HARMAN. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 158 Cal. App. 4th 407, 69 Cal. Rptr. 3d 750.

No. 07–1381. STERNGASS *v.* PALISADES INTERSTATE PARK COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 260 Fed. Appx. 395.

No. 07–1382. DORSEY *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 117 S. W. 3d 332.

No. 07–1409. AUSTIN *v.* DOWNS, RACHLIN & MARTIN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 270 Fed. Appx. 52.

No. 07–1421. CANON LATIN AMERICA, INC. *v.* LANTECH (CR), S. A. C. A. 11th Cir. Certiorari denied. Reported below: 508 F. 3d 597.

No. 07–1447. WILSON *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 66 M. J. 39.

No. 07–1448. MITCHELL *v.* PEAKE, SECRETARY OF VETERANS AFFAIRS. C. A. 4th Cir. Certiorari denied. Reported below: 268 Fed. Appx. 215.

No. 07–1459. HORACE MANN INSURANCE CO. *v.* GENERAL STAR NATIONAL INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 514 F. 3d 327.

No. 07–1461. BAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 3d 899.

No. 07–1464. DELLAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 573.

No. 07–1469. ROSIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 16.

No. 07–5347. MCCLUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 483 F. 3d 273.

No. 07–5434. GRANADO-VELASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 225 Fed. Appx. 247.

No. 07–5665. BADER *v.* MUKASEY, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 291.

No. 07–6045. SANTOS-HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 225 Fed. Appx. 841.

No. 07–6212. RIVERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 225 Fed. Appx. 813.

No. 07–6241. BRAZZEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 236 Fed. Appx. 26.

No. 07–6381. NAVARRETE-FIERRO, AKA FIERRO, AKA NAVARRO, AKA NAVARRETE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 230 Fed. Appx. 423.

No. 07–6392. LOPEZ-MATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 229 Fed. Appx. 351.

No. 07–7003. GALICIA-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 234 Fed. Appx. 259.

No. 07–7040. LARES-MERAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 234 Fed. Appx. 265.

No. 07–7591. YANEZ-CORBO, AKA NUNEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 237 Fed. Appx. 611.

No. 07–7646. PRESTO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 498 F. 3d 415.

No. 07–7821. VALDOVINOS-ZAMORA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 235 Fed. Appx. 621.

No. 07–7834. TERRY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 234 Fed. Appx. 82.

No. 07–8638. KAHARUDIN *v.* MUKASEY, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 500 F. 3d 619.

No. 07–8857. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 372 Ill. App. 3d 1096, 940 N. E. 2d 306.

No. 07–8978. PELTIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 3d 389.

No. 07–8990. CRUTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 238 Fed. Appx. 903.

No. 07–9173. MOLINA SAVEDRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 7.

No. 07–9186. LUNA-BUSTAMANTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 383.

No. 07–9324. BROWN *v.* DOTSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 242 Fed. Appx. 19.

No. 07–9375. CORTEZ CRATER *v.* GALAZA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 491 F. 3d 1119.

No. 07–9462. DWINELLS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 508 F. 3d 63.

No. 07–9697. KELLEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 969 So. 2d 379.

No. 07–9760. SERAFIN *v.* SCHOOL OF EXCELLENCE IN EDUCATION. C. A. 5th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 684.

No. 07–9917. SALAZAR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 643.

No. 07–9996. VOELKER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 07–10029. DEMELIO, AKA COOLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 257 Fed. Appx. 511.

No. 07–10069. YATES *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 161 Wash. 2d 714, 168 P. 3d 359.

No. 07–10409. GRAY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 07–10410. ORTEGA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 07–10426. SAY *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10429. ROSAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10443. HAMILTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10447. GOMEZ *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 970 So. 2d 824.

No. 07–10449. HOWARD *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–10450. ITURRALDE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 07–10451. DUNLAP *v.* GREEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 6.

No. 07–10454. ROQUE MORA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10455. MCCREARY *v.* BIRKETT, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 07–10461. BURSE *v.* STOVALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10462. BROYLES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 369 Ill. App. 3d 1046, 932 N. E. 2d 1220.

No. 07–10463. ALVARADO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10479. C. B. *v.* D. M. Super. Ct. N. J., App. Div. Certiorari denied.

No. 07–10480. MOSES *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 971 So. 2d 835.

No. 07–10483. CHARLES *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 07–10490. DIXON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 07–10491. KANE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 07–10492. JONES *v.* JONES-SMITH. Ct. App. Ga. Certiorari denied.

No. 07–10493. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 07–10499. MOSES *v.* BRANKER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 07–10500. MCARTHUR *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10504. BLAIR *v.* CITY OF HAWTHORNE, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–10507. TERRY *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 85.

No. 07–10512. THOMPSON *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 07–10517. MCGOWAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 07–10530. BLADES *v.* MILLER, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 261 Fed. Appx. 314.

No. 07–10531. BALDWIN *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 07–10536. HARTMAN *v.* BOBBY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 3d 347.

No. 07–10563. LAWSON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 973 So. 2d 459.

No. 07–10608. HOBLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 07–10609. HESS *v.* OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION. C. A. 9th Cir. Certiorari denied. Reported below: 514 F. 3d 909.

No. 07–10610. HESS *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 637.

No. 07–10613. BOWIE *v.* BRANKER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 512 F. 3d 112.

No. 07–10615. GLASS *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 07–10666. BUTLER ET UX. *v.* SUFFOLK COUNTY, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 255 Fed. Appx. 544.

No. 07–10670. HOLLEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 935 A. 2d 13.

No. 07–10677. MARROQUIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10695. SALAZAR ESTRADA *v.* SCRIBNER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 512 F. 3d 1227.

No. 07–10719. TAYLOR *v.* HUMPHREYS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–10726. JERNIGAN *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 07–10766. WHITE *v.* WEST VIRGINIA PAROLE BOARD. Sup. Ct. App. W. Va. Certiorari denied.

No. 07–10776. MEREDITH *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 964 So. 2d 247.

No. 07–10800. DURAND *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 966 So. 2d 400.

No. 07–10810. FLOWERS *v.* LANG ET UX. Sup. Ct. Miss. Certiorari denied.

No. 07–10834. BISHOP *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 285.

No. 07–10835. MEYER *v.* BRANKER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 3d 358.

No. 07–10847. TYREE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 449 Mass. 1034, 873 N. E. 2d 741.

No. 07–10869. HOWARD *v.* OHIO. Ct. App. Ohio, Clark County. Certiorari denied. Reported below: 174 Ohio App. 3d 562, 883 N. E. 2d 1077.

No. 07–10870. YORK *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 653.

No. 07–10883. CLECKLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 850.

No. 07–10887. JONES *v.* FISCHER, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied.

No. 07–10905. SATTERFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 254 Fed. Appx. 947.

No. 07–10922. MANNING *v.* POTTER, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 743.

No. 07–10924. LEON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 10 N. Y. 3d 122, 884 N. E. 2d 1037.

No. 07–10975. SCHOFFNER *v.* HULICK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–10982. YOUNG *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 07–11011. STAPLES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 266 Fed. Appx. 167.

No. 07–11012. RANDOLPH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 622.

No. 07–11028. SMITH *v.* STINE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 312.

No. 07–11030. ERVIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 428.

No. 07–11032. PEREZ-TOLEDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 915.

No. 07–11033. LUCAS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 925 A. 2d 624.

No. 07–11041. BRADFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–11044. ALVARADO-AYALA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 398.

No. 07–11045. POWDRILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 316.

No. 07–11046. PAREDES-MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 328.

No. 07–11051. RICHARDSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 265 Fed. Appx. 62.

No. 07–11057. STUCKEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 468.

No. 07–11058. BURKLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 513 F. 3d 1183.

No. 07–11062. GARCIA-OZUNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 515.

No. 07–11063. HAMILTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 516 F. 3d 597.

No. 07–11064. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 841.

No. 07–11065. HOLMES, AKA ROBBINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 508 F. 3d 1091.

No. 07–11067. SOTO-LARA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 07–11071. PRECIADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 506 F. 3d 808 and 252 Fed. Appx. 836.

No. 07–11074. LOPEZ-GUZMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 348.

No. 07–11076. LIN XIAN WU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 268 Fed. Appx. 139.

No. 07–11078. BELTRAN-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 371.

No. 07–11079. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 272 Fed. Appx. 465.

No. 07–11081. BOYSAW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 284.

No. 07–11082. BERNAL-IBANOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 266 Fed. Appx. 59.

No. 07–11083. BATES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 934 A. 2d 946.

No. 07–11087. REDDITT *v.* O'BRIEN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 608.

No. 07–11089. GOMEZ-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 330.

No. 07–11090. GOURLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 656.

No. 07–11091. HAILEY *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 7th Cir. Certiorari denied.

No. 07–11092. BAEZ-MARTINEZ *v.* UNITED STATES (Reported below: 268 Fed. Appx. 323); ALVARENGA-HERNANDEZ, AKA SLVARENGA, AKA ALVARENZA *v.* UNITED STATES (274 Fed. Appx. 347); BARRIOS *v.* UNITED STATES (277 Fed. Appx. 509); CARBAJAL-ALVARADO, AKA CAVAJAL, AKA CARBARJAR, AKA CARBAJAL *v.* UNITED STATES (275 Fed. Appx. 427); HERNANDEZ-GUIDO *v.* UNITED STATES (277 Fed. Appx. 420); ORTEGA-HERNANDEZ, AKA HERNANDEZ *v.* UNITED STATES (272 Fed. Appx. 368); and PERALES-SOLIS *v.* UNITED STATES (275 Fed. Appx. 443). C. A. 5th Cir. Certiorari denied.

No. 07–11097. FIFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 654.

No. 07–11101. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 997.

No. 07–11102. TILLERY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 66 M. J. 367.

No. 07–11105. HUNTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 619.

No. 07–11111. SAVAGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 296.

No. 07–11113. BROWN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 516 F. 3d 1047.

No. 07–11114. BANKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 926 A. 2d 158.

No. 07–11117. JIMENEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 07–11120. PERDOMO-ESPANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 522 F. 3d 983.

No. 07–11121. TREMBLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 749.

No. 07–11122. TESTERMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 328.

No. 07–11140. CALDWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 518 F. 3d 426.

No. 07–619. PT PERTAMINA (PERSERO), FKA PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA *v.* KARAHA BODAS CO., L. L. C. C. A. 2d Cir. Motion of Republic of Indonesia for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 500 F. 3d 111.

No. 07–931. MAGNOLIA INDUSTRIAL FABRICATORS, INC., ET AL. *v.* DEVON LOUISIANA CORP. ET AL. C. A. 5th Cir. Motion of Maritime Law Association of the United States for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 247 Fed. Appx. 539.

No. 07–1178. HJORTNESS, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, HJORTNESS ET UX., ET AL. *v.* NEENAH JOINT SCHOOL DISTRICT. C. A. 7th Cir. Motions of Tourette Syndrome Association, Inc., and Autism Speaks for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 507 F. 3d 1060.

No. 07–1247. GOLDSTEIN ET AL. *v.* PATAKI ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 516 F. 3d 50.

Rehearing Denied

No. 07–1025. ROGERS *v.* GEORGIA, 552 U. S. 1311;

No. 07–5658. TERRY *v.* UNITED STATES, 552 U. S. 926;

No. 07–8434. NICKLASSON *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 553 U. S. 1007;

No. 07–9048. YANEZ *v.* SCRIBNER, WARDEN, 552 U. S. 1299;

No. 07–9064. HARRIS, AKA HARRIS-BEY *v.* KILPATRICK ET AL., 552 U. S. 1299;

No. 07–9133. GARCIA *v.* UNITED STATES, 553 U. S. 1007;

No. 07–9166. CHILDS *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL., 552 U. S. 1316;

No. 07–9274. BROWN *v.* CHESNEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, 552 U. S. 1319;

No. 07–9415. JONES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 553 U. S. 1008;

No. 07–9496. IN RE GRIFFIN, 552 U. S. 1308;

No. 07–9524. THOMAS *v.* MONROE, 553 U. S. 1020;

No. 07–9676. IN RE YOUNG, 553 U. S. 1003;

No. 07–9700. STERLING *v.* STEELE, SUPERINTENDENT, SOUTHEAST CORRECTIONAL CENTER, 553 U. S. 1022;

No. 07–9907. YOUNG *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 553 U. S. 1012;

No. 07–9920. STRUCK *v.* COOK COUNTY PUBLIC GUARDIAN, 553 U. S. 1023; and

No. 07–9945. NEAL *v.* UNITED STATES, 552 U. S. 1331. Petitions for rehearing denied.

No. 06–11616. FERNANDEZ *v.* UNITED STATES, 552 U. S. 854. Motion for leave to file petition for rehearing denied.

JUNE 25, 2008

Certiorari Denied

No. 07–11509 (07A1026). YARBROUGH *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 520 F. 3d 329.

JUNE 27, 2008

Certiorari Granted—Vacated and Remanded

No. 06–1454. SEMPRA GENERATION ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.; and

No. 06–1468. DYNERGY POWER MARKETING, INC., ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cty.*, *ante*, p. 527. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions. Reported below: 474 F. 3d 587.

No. 07–8018. YOUNGER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Giles* v. *California*, *ante*, p. 353.

Miscellaneous Order

No. 07–1239. WINTER, SECRETARY OF THE NAVY, ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 916.] Motion of the Acting Solicitor General to calendar oral argument in October 2008 granted.

Certiorari Granted

No. 07–984. COEUR ALASKA, INC. *v.* SOUTHEAST ALASKA CONSERVATION COUNCIL ET AL.; and

No. 07–990. ALASKA *v.* SOUTHEAST ALASKA CONSERVATION COUNCIL ET AL. C. A. 9th Cir. Motion of Pacific Legal Founda-

tion et al. for leave to file a brief as *amici curiae* in No. 07–990 granted. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 486 F. 3d 638.

No. 07–1315. KNOWLES, WARDEN *v.* MIRZAYANCE. C. A. 9th Cir. Certiorari granted.

Certiorari Denied

No. 06–1458. GEDDES ET UX., INDIVIDUALLY AND AS PARENTS AND GUARDIANS OF GEDDES, A MINOR CHILD *v.* UNITED STAFFING ALLIANCE EMPLOYEE MEDICAL PLAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 469 F. 3d 919.

No. 07–257. CONTINENTAL CARBON CO. ET AL. *v.* ACTION MARINE, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 481 F. 3d 1302.

No. 07–335. PARKER ET AL. *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 478 F. 3d 370.

No. 07–776. KELLY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 276 Fed. Appx. 261.

No. 07–841. AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF AMSCHWAND *v.* SPHERION CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 3d 342.

No. 07–891. ALEXANDER ET AL. *v.* BOSCH AUTOMOTIVE SYSTEMS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 232 Fed. Appx. 491.

No. 07–8682. LEACHMAN *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 06–1521. GOERES *v.* CHARLES SCHWAB & CO. INC. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 220 Fed. Appx. 663.

JULY 1, 2008

Certiorari Denied

No. 08–5020 (08A8). SCHWAB *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented

to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 995 So. 2d 922.

JULY 2, 2008

Dismissal Under Rule 46

No. 07–1284. MORALES *v.* JETT, WARDEN. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 499 F. 3d 668.

Miscellaneous Order

No. 08A3. DEAN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ET AL. Application for stay of enforcement of the judgment of the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

JULY 10, 2008

Certiorari Denied

No. 08–5086 (08A19). JACKSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 523 F. 3d 273.

No. 08–5164 (08A31). TURNER *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 08–5165 (08A32). TURNER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 284 Fed. Appx. 182.

No. 08–5214 (08A36). JACKSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir.

Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 523 F. 3d 273.

JULY 16, 2008

Dismissal Under Rule 46

No. 07–10741. HOLMES *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari dismissed under this Court's Rule 46. Reported below: 973 So. 2d 1140.

JULY 17, 2008

Dismissal Under Rule 46

No. 07–1432. SKOWRONEK *v.* AMERICAN STEAMSHIP CO. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 505 F. 3d 482.

JULY 18, 2008

Dismissal Under Rule 46

No. 07–10604. SALAZAR *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari dismissed under this Court's Rule 46.

JULY 23, 2008

Miscellaneous Order

No. 08A59. BISHOP *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

Certiorari Denied

No. 08–5359 (08A56). BISHOP *v.* MISSISSIPPI. Sup. Ct. Miss. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 08–5392 (08A67). BISHOP *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, presented

to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 288 Fed. Appx. 146.

JULY 28, 2008

Miscellaneous Order

No. 07A963. STEWART *v.* SUPERIOR COURT OF CALIFORNIA, HUMBOLDT COUNTY, ET AL. Ct. App. Cal., 1st App. Dist. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

Rehearing Denied

No. 07–1102. CANAS ET UX., AS NATURAL GUARDIANS AND NEXT FRIENDS OF CANAS, ET AL. *v.* AL-JABI ET AL., 553 U. S. 1065;

No. 07–1113. PERSIK *v.* GROUP HEALTH COOPERATIVE INC. ET AL., 553 U. S. 1018;

No. 07–1131. IN RE SIMMONS, 553 U. S. 1031;

No. 07–1142. ARDITO *v.* NBC UNIVERSAL, INC., ET AL., 553 U. S. 1005;

No. 07–1168. JOHNSON *v.* GADSON ET AL., 553 U. S. 1053;

No. 07–1170. R AND J MURRAY, LLC *v.* MURRAY COUNTY, GEORGIA, ET AL., 553 U. S. 1053;

No. 07–1171. SAMMANN ET AL. *v.* MAYER ET AL., 553 U. S. 1033;

No. 07–1224. SHOWALTER *v.* ALBUQUERQUE TITLE CO., INC., ET AL., 553 U. S. 1066;

No. 07–1242. FERNANDES ET UX. *v.* SPARTA TOWNSHIP COUNCIL ET AL., 553 U. S. 1066;

No. 07–1297. POLL *v.* PAULSON, SECRETARY OF THE TREASURY, ET AL., 553 U. S. 1054;

No. 07–1313. CRAWFORD *v.* DEPARTMENT OF HOMELAND SECURITY ET AL., 553 U. S. 1054;

No. 07–1340. MARRO *v.* VIRGINIA ELECTRIC & POWER CO., 553 U. S. 1066;

No. 07–6455. DURMER *v.* ROGERS, ADMINISTRATOR, ADULT DIAGNOSTIC AND TREATMENT CENTER, ET AL., 552 U. S. 1026;

No. 07–8752. THEER *v.* NORTH CAROLINA, 553 U. S. 1055;

No. 07–8937. GATLIN *v.* UNITED STATES, 553 U. S. 1067;

No. 07–9016. FRANKLIN *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 553 U. S. 1067;

No. 07–9127. HAHN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 552 U. S. 1315;

No. 07–9150. MARSHALL *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 552 U. S. 1316;

No. 07–9429. HURTADO *v.* UNITED STATES, 553 U. S. 1094;

No. 07–9436. MERRIWEATHER *v.* FREDRICK ET AL., 553 U. S. 1008;

No. 07–9503. CHERRY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 553 U. S. 1009;

No. 07–9566. COCHRANE *v.* BURTT, WARDEN, ET AL., 553 U. S. 1021;

No. 07–9615. OGHENESORO *v.* MUKASEY, ATTORNEY GENERAL, 553 U. S. 1009;

No. 07–9650. OLIVER *v.* LONG ET AL., 553 U. S. 1036;

No. 07–9682. ROSALES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 553 U. S. 1036;

No. 07–9722. FIELDING *v.* PATRICK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL., 553 U. S. 1022;

No. 07–9758. STRUCK *v.* HARRIS (two judgments), 553 U. S. 1038;

No. 07–9832. HALEY *v.* MISSOURI ET AL., 553 U. S. 1022;

No. 07–9854. SAN PEDRO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 553 U. S. 1023;

No. 07–9896. WILLIAMS *v.* HAWS, WARDEN, 553 U. S. 1056;

No. 07–10003. MESSIER *v.* UNITED STATES, 553 U. S. 1013;

No. 07–10045. FORBES *v.* FLORIDA, 553 U. S. 1069;

No. 07–10046. IMLER *v.* CENTRAL MUTUAL INSURANCE CO. ET AL., 553 U. S. 1069;

No. 07–10062. IN RE ADAMS, 553 U. S. 1064;

No. 07–10065. LINH BAO *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, 553 U. S. 1041;

No. 07–10070. IN RE DADE, 553 U. S. 1017;

No. 07–10084. IN RE STONIER, 553 U. S. 1017;

No. 07–10086. GERA *v.* CORBETT, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL., 553 U. S. 1070;

No. 07–10094. WARE *v.* MICHIGAN DEPARTMENT OF LABOR ET AL., 553 U. S. 1070;

No. 07–10096. CENSKE *v.* CLINTON COUNTY SHERIFF'S DEPARTMENT ET AL., 553 U. S. 1071;

No. 07–10109. WARLICK *v.* FLORIDA, 553 U. S. 1041;

No. 07–10110. WARLICK *v.* FLORIDA, 553 U. S. 1041;

No. 07–10127. HERSHFELDT *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 553 U. S. 1071;

No. 07–10180. WOODS *v.* WILLIAMS & SONS PLUMBING & HEATING INC. ET AL., 553 U. S. 1059;

No. 07–10237. LENTWORTH *v.* POTTER ET AL., 553 U. S. 1059;

No. 07–10242. GOODLEY *v.* TEXAS, 553 U. S. 1071;

No. 07–10299. BROWN *v.* DONALD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL., 553 U. S. 1044;

No. 07–10318. MENDEZ *v.* UNITED STATES, 553 U. S. 1044;

No. 07–10331. NEWSON *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL FACILITY, 553 U. S. 1059;

No. 07–10386. MARTINEZ *v.* UNITED STATES, 553 U. S. 1046;

No. 07–10405. PENLAND *v.* UNITED STATES, 553 U. S. 1059;

No. 07–10414. AWALA *v.* UNITED STATES, 553 U. S. 1047;

No. 07–10418. BEA *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 906;

No. 07–10471. PETTIES *v.* NEW YORK CITY HOUSING AUTHORITY, 553 U. S. 1098;

No. 07–10476. MARTIN *v.* ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY ET AL., 553 U. S. 1085;

No. 07–10542. CURBELO *v.* UNITED STATES, 553 U. S. 1073;

No. 07–10574. SMITH *v.* SDI INDUSTRIES, INC., 553 U. S. 1074;

No. 07–10753. OSAMOR *v.* UNITED STATES, 553 U. S. 1090;

No. 07–10787. THOMPSON *v.* UNITED STATES, 553 U. S. 1090; and

No. 07–10900. MITCHELL *v.* UNITED STATES, 553 U. S. 1101. Petitions for rehearing denied.

No. 07–9250. RECHANIK *v.* MICROSOFT CORP., 553 U. S. 1048. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 07–10621. IN RE HADIX, 553 U. S. 1053. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 06–1659. YOUNG *v.* UNITED STATES (two judgments), 552 U. S. 823; and

No. 07–9480. JENKINS *v.* SUNCOAST CONSTRUCTION GROUP ET AL., 553 U. S. 1009. Motions for leave to file petitions for rehearing denied.

AUGUST 1, 2008

Dismissal Under Rule 46

No. 07–1100. CIENEGA GARDENS ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 503 F. 3d 1266.

AUGUST 7, 2008

Certiorari Denied

No. 08–5652 (08A112). CHI *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

AUGUST 14, 2008

Dismissal Under Rule 46

No. 07–1101. CHANCELLOR MANOR ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 503 F. 3d 1266.

AUGUST 18, 2008

Miscellaneous Orders

No. 07–526. CARCIERI, GOVERNOR OF RHODE ISLAND, ET AL. *v.* KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL. C. A. 1st Cir. [Certiorari granted, 552 U. S. 1229.] Motion of Citizens Equal Rights Foundation et al. for leave to file a brief as *amici curiae* out of time granted.

No. 07–562. ALTRIA GROUP, INC., ET AL. *v.* GOOD ET AL. C. A. 1st Cir. [Certiorari granted, 552 U. S. 1162.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 07–665. PLEASANT GROVE CITY, UTAH, ET AL. *v.* SUMMUM. C. A. 10th Cir. [Certiorari granted, 552 U. S. 1294.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 07–689. BARTLETT, EXECUTIVE DIRECTOR OF NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL. *v.* STRICKLAND ET AL. Sup. Ct. N. C. [Certiorari granted, 552 U. S. 1256.] Motion of National Association for the Advancement of Colored People et al. for leave to file a brief as *amici curiae* out of time granted.

No. 07–751. PEARSON ET AL. *v.* CALLAHAN. C. A. 10th Cir. [Certiorari granted, 552 U. S. 1279.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

Rehearing Denied

No. 06–1666. MUNAF ET AL. *v.* GEREN, SECRETARY OF THE ARMY, ET AL., 553 U. S. 674;

No. 07–394. GEREN, SECRETARY OF THE ARMY, ET AL. *v.* OMAR ET AL., NEXT FRIENDS OF OMAR, 553 U. S. 674;

No. 07–1117. THOMAS *v.* TRICO PRODUCTS CORP. ET AL., 553 U. S. 1079;

No. 07–1194. HENLEY *v.* BELL, WARDEN, *ante*, p. 918;

No. 07–1198. SPLITTORFF *v.* AIGNER ET AL., 553 U. S. 1065;

No. 07–1278. DAHLQUIST *v.* VUKICH, *ante*, p. 903;

No. 07–1312. ROSA *v.* CALIFORNIA ET AL., *ante*, p. 904;

No. 07–1314. KIM *v.* WASHINGTON STATE DEPARTMENT OF LICENSING, *ante*, p. 904;

No. 07–1332. WARE ET AL. *v.* FEDERAL HIGHWAY ADMINISTRATION ET AL., *ante*, p. 919;

No. 07–1373. GLENMONT HILLS ASSOCIATES PRIVACY WORLD AT GLENMONT METRO CENTRE *v.* MONTGOMERY COUNTY, MARYLAND, 553 U. S. 1102;

No. 07–7834. TERRY ET AL. *v.* UNITED STATES, *ante*, p. 921;

No. 07–9673. SIMEONE *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL., 553 U. S. 1036;

No. 07–9778. LANG *v.* HAMLET, WARDEN, 553 U. S. 1038;

No. 07–9990. WILMS *v.* FINNAN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY, 553 U. S. 1068;

No. 07–10019. GUINN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 553 U. S. 1069;

No. 07–10054. WISE *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA; and WISE *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL., 553 U. S. 1070;

No. 07–10122. CALDWELL *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 553 U. S. 1081;

No. 07–10156. PARADISE *v.* GEORGIA, 553 U. S. 1082;

No. 07–10187. BRIGHT *v.* WRIGHT, WARDEN, 553 U. S. 1083;

No. 07–10203. SHANKLIN *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL., 553 U. S. 1042;

No. 07–10205. SMITH *v.* VIRGINIA, 553 U. S. 1059;

No. 07–10211. ZHENLU ZHANG *v.* SCIENCE & TECHNOLOGY CORP. ET AL., 553 U. S. 1095;

No. 07–10247. CALLIGAN *v.* WILSON, SUPERINTENDENT, WESTVILLE CORRECTIONAL FACILITY, 553 U. S. 1095;

No. 07–10306. COMIER *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 553 U. S. 1084;

No. 07–10361. VANDERWALL *v.* VIRGINIA, *ante*, p. 906;

No. 07–10407. CORNET *v.* FLORIDA, *ante*, p. 906;

No. 07–10425. GIBBS *v.* MINNER, GOVERNOR OF DELAWARE, ET AL., *ante*, p. 906;

No. 07–10451. DUNLAP *v.* GREEN ET AL., *ante*, p. 923;

No. 07–10455. MCCREARY *v.* BIRKETT, WARDEN, ET AL., *ante*, p. 923;

No. 07–10575. TAVAREZ *v.* MARSHALL, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, 553 U. S. 1098;

No. 07–10783. SCHILS *v.* WASHTENAW COMMUNITY HEALTH ORGANIZATION, 553 U. S. 1098;

No. 07–10870. YORK *v.* SOUTH CAROLINA ET AL., *ante*, p. 926; and

No. 07–10922. MANNING *v.* POTTER, POSTMASTER GENERAL, *ante*, p. 926. Petitions for rehearing denied.

AUGUST 20, 2008

Dismissal Under Rule 46

No. 08–5242. HARRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 524 F. 3d 1223.

AUGUST 26, 2008

Dismissal Under Rule 46

No. 08–172. STRYKER CORP. ET AL. *v.* ACUMED LLC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 525 F. 3d 1319.

AUGUST 28, 2008

Dismissal Under Rule 46

No. 07–1556. OLTMAN, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF OLTMAN, DECEASED, ET AL. *v.* HOLLAND AMERICA LINE USA, INC., ET AL. Sup. Ct. Wash. Certiorari dismissed under this Court's Rule 46.1. Reported below: 163 Wash. 2d 236, 178 P. 3d 981.

SEPTEMBER 5, 2008

Miscellaneous Orders

No. 07–542. ARIZONA *v.* GANT. Sup. Ct. Ariz. [Certiorari granted, 552 U. S. 1230.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 07–544. HEDGPETH, WARDEN *v.* PULIDO. C. A. 9th Cir. [Certiorari granted *sub nom. Chrones v. Pulido*, 552 U. S. 1230.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 07–581. 14 PENN PLAZA LLC ET AL. *v.* PYETT ET AL. C. A. 2d Cir. [Certiorari granted, 552 U. S. 1178.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 07–610. LOCKE ET AL. *v.* KARASS, STATE CONTROLLER, ET AL. C. A. 1st Cir. [Certiorari granted, 552 U. S. 1178.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 07–636. KENNEDY, EXECUTRIX OF THE ESTATE OF KENNEDY, DECEASED *v.* PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN ET AL. C. A. 5th Cir. [Certiorari

granted, 552 U. S. 1178.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of American Benefits Council et al. for leave to file a brief as *amici curiae* granted.

No. 07–854. VAN DE KAMP ET AL. *v.* GOLDSTEIN. C. A. 9th Cir. [Certiorari granted, 552 U. S. 1309.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

Rehearing Denied

No. 07–1326. CHI-MING CHOW *v.* MICHIGAN ATTORNEY GRIEVANCE COMMISSION, *ante*, p. 919;

No. 07–1343. DIBBS *v.* ROLDAN ET AL., *ante*, p. 919;

No. 07–1406. WAGSTAFF *v.* DEPARTMENT OF EDUCATION, *ante*, p. 904;

No. 07–9697. KELLEY *v.* FLORIDA, *ante*, p. 922;

No. 07–10144. FLUKER *v.* CALIFORNIA ET AL., 553 U. S. 1081;

No. 07–10324. BARDWELL *v.* BARDWELL, 553 U. S. 1097;

No. 07–10351. ROBINSON *v.* ARIZONA ET AL., 553 U. S. 1097;

No. 07–10710. GILYARD *v.* ACEVEDO, WARDEN, 553 U. S. 1088;

No. 07–10719. TAYLOR *v.* HUMPHREYS, WARDEN, *ante*, p. 925;

No. 07–10835. MEYER *v.* BRANKER, WARDEN, *ante*, p. 925;

No. 07–10839. IRVIN *v.* UNITED STATES, 553 U. S. 1100;

No. 07–10959. HOWTON *v.* UNITED STATES, *ante*, p. 908; and

No. 07–11091. HAILEY *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 928. Petitions for rehearing denied.

No. 07–10049. IN RE DAVIS, 553 U. S. 1064. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

SEPTEMBER 8, 2008

Miscellaneous Order

No. 07–343. KENNEDY *v.* LOUISIANA, *ante*, p. 407. Petitioner Patrick Kennedy is invited to file a supplemental brief, not to exceed 4,500 words, addressing not only whether rehearing should be granted but also the merits of the issue raised in the petition for rehearing. Brief should be filed with the Clerk and served upon opposing counsel by 2 p.m. Wednesday, September 17, 2008. The Acting Solicitor General is invited to file at the same time a brief, not to exceed 2,500 words, expressing the views of the United States. Respondent Louisiana is invited to file a supple-

mental brief, not to exceed 4,500 words, also addressing the merits of the issue raised in the petition for rehearing. Brief should be filed with the Clerk and served upon opposing counsel by 2 p.m. Wednesday, September 24, 2008.

SEPTEMBER 16, 2008

Certiorari Denied

No. 08–6260 (08A229). ALDERMAN *v.* DONALD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 293 Fed. Appx. 693.

No. 08–6288 (08A230). ALDERMAN *v.* GEORGIA. Super. Ct. Chatham County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 23, 2008

Dismissal Under Rule 46

No. 08–132. FLORIDA *v.* JOHNSON. Sup. Ct. Fla. Certiorari dismissed under this Court's Rule 46. Reported below: 982 So. 2d 672.

Miscellaneous Orders

No. 08A255. HENYARD *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 08–66 (08A241). DAVIS *v.* GEORGIA. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

Certiorari Denied

No. 08–6392 (08A248). HENYARD *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented

to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 992 So. 2d 120.

SEPTEMBER 26, 2008

Dismissal Under Rule 46

No. 07–1402. NATION *v.* WISCONSIN. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 512 F. 3d 921.

SEPTEMBER 29, 2008

Dismissal Under Rule 46

No. 08–5497. GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 250 Fed. Appx. 18.

OCTOBER 1, 2008

Miscellaneous Order

No. 07–689. BARTLETT, EXECUTIVE DIRECTOR OF NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL. *v.* STRICKLAND ET AL. Sup. Ct. N. C. [Certiorari granted, 552 U. S. 1256.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

Certiorari Granted

No. 07–1309. BOYLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 283 Fed. Appx. 825.

No. 07–1372. HAWAII ET AL. *v.* OFFICE OF HAWAIIAN AFFAIRS ET AL. Sup. Ct. Haw. Certiorari granted. Reported below: 117 Haw. 174, 177 P. 3d 884.

No. 07–1410. UNITED STATES *v.* NAVAJO NATION. C. A. Fed. Cir. Certiorari granted. Reported below: 501 F. 3d 1327.

No. 07–1529. MONTEJO *v.* LOUISIANA. Sup. Ct. La. Certiorari granted. Reported below: 974 So. 2d 1238.

No. 07–1356. KANSAS *v.* VENTRIS. Sup. Ct. Kan. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 285 Kan. 595, 176 P. 3d 920.

No. 07–1601. BURLINGTON NORTHERN & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.; and

No. 07–1607. SHELL OIL CO. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 520 F. 3d 918.

No. 07–9712. PUCKETT *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Whether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of Federal Rule of Criminal Procedure 52(b)." Reported below: 505 F. 3d 377.

No. 07–9995. RIVERA *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 227 Ill. 2d 1, 879 N. E. 2d 876.

No. 07–10441. CORLEY *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 500 F. 3d 210.

No. 08–88. VERMONT *v.* BRILLON. Sup. Ct. Vt. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 183 Vt. 475, 955 A. 2d 1108.

Rehearing Denied

No. 07–343. KENNEDY *v.* LOUISIANA, *ante*, p. 407. The opinion of the Court is modified by the addition of a footnote at page 426, after the word "considered" in the last paragraph of Part III–A. The footnote is as follows:

> * When issued and announced on June 25, 2008, the Court's decision neither noted nor discussed the military penalty for rape under the Uniform Code of Military Justice. See 10 U. S. C. §§856 (2000 ed.), 920 (2000 ed. and Supp. V); Manual for Courts-Martial, United States, Part IV, Art. 120, ¶45.f(1), p. IV–78 (2008). In a petition for rehearing respondent argues that the military penalty bears on our consideration of the question in this case. For the reasons set forth in the statement respecting the denial of rehearing, *post*, p. 946, we find that the military penalty does not affect our reasoning or conclusions.

The dissenting opinion is modified as follows:

(1) By the addition of the words "a federal district court to impose" at page 459 between the words "a law permitting" and the words "the death penalty" in the first paragraph of Part I–E;

(2) By the addition of footnote 6 after the word "values" in said paragraph. The footnote is as follows:

> [6]Moreover, as noted in the petition for rehearing, the Uniform Code of Military Justice permits such a sentence. See 10 U. S. C. §856 (2000 ed.); Manual for Courts-Martial, United States, Part II, Ch. X, Rule 1004(c)(9), p. II–131 (2008); *id.*, Part IV, Art. 120, ¶45.f(1), p. IV–78.

Petition for rehearing denied.

JUSTICE THOMAS and JUSTICE ALITO would grant the petition for rehearing.

Statement of JUSTICE KENNEDY, with whom JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, respecting the denial of rehearing.

In its petition for rehearing respondent argues that the military penalty for rape, a congressional amendment of the Uniform Code of Military Justice (UCMJ) in 2006, and a related Executive Order in 2007 should alter the Court's analysis of the Eighth Amendment question in this case. After considering the petition as well as supplemental briefs from the parties and the United States, the Court has determined that rehearing is not warranted.

The military death penalty for rape has been the rule for more than a century. As respondent acknowledges in its petition for rehearing, military law has included the death penalty for rape of a child or adult victim since at least 1863. See §30, 12 Stat. 736. Since 1950, that punishment has applied to peacetime offenses by members of the military. See Art. 120, 64 Stat. 140. The death penalty, however, has not been carried out against a military offender for almost 50 years. The last instance of military capital punishment, in 1961, was for the crimes of rape and attempted murder. See R. Paternoster, R. Brame, & S. Bacon, The Death Penalty: America's Experience with Capital Punishment 69 (2008). There are six individuals now subject to a final sentence of death under the UCMJ, see NAACP Legal Defense and Educational Fund, Inc., Death Row U. S. A. 66 (Winter 2008), all of whom committed offenses that involved the death of a victim.

In 2006, Congress passed the National Defense Authorization Act, which authorized that year's appropriations for military and national-security activities. Pub. L. 109–163. Also in that bill, Congress revised the military's sexual-assault statutes, in part by reclassifying the UCMJ's offense of rape as two separate crimes: adult rape and child rape. §552(a)(1), 119 Stat. 3257. It is unclear what effect, if any, that reclassification worked on the availability of the military death penalty. Pending the President's setting the maximum penalty for adult rape and child rape, Congress included a temporary provision applying the existing maximum punishment of death for rape as the "interim maximum punishmen[t]" for those crimes. §552(b)(1), *id.*, at 3263; see also 10 U. S. C. §856. But Congress also removed from the text of the statute itself, §920, the specific authorization of "death" as a punishment; the new statute provides only that adult rape and child rape shall be punished "as a court-martial may direct." For his part, the President later left in place, in the Manual for Courts-Martial, the availability of the death penalty for rape of an adult or child victim. Exec. Order No. 13447, 72 Fed. Reg. 56214 (2007); Manual for Courts-Martial, United States, Part IV, ¶45.f(1) (2008). The parties disagree on the effect of Congress' and the President's actions in light of 10 U. S. C. §818, which allows imposition of the death penalty only "when specifically authorized by this chapter."

In any event, authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context. The military death penalty for rape was in effect before the decisions in *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, and *Coker* v. *Georgia*, 433 U. S. 584 (1977); and when the Court surveyed state and federal law in *Coker*, it made no mention of the military penalty, see *id.*, at 595–596, 593, and n. 6 (plurality opinion) (not including the military as a "jurisdiction in the United States" that authorized the death penalty for rape, and naming the Federal Government among jurisdictions that recognized the death penalty for rape prior to *Furman* but citing only the nonmilitary provision). The same is true of more recent Eighth Amendment cases in the civilian context. See *Enmund* v. *Florida*, 458 U. S. 782, 789–793 (1982); *Tison* v. *Arizona*, 481 U. S. 137, 152–154 (1987). This case, too, involves the application of the Eighth Amendment to civilian law; and so we need not decide whether certain considerations might justify

differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our decision). Cf. *Loving* v. *United States*, 517 U. S. 748, 755 (1996).

That the Manual for Courts-Martial retains the death penalty for rape of a child or an adult when committed by a member of the military does not draw into question our conclusions that there is a consensus against the death penalty for the crime in the civilian context and that the penalty here is unconstitutional. The laws of the separate States, which have responsibility for the administration of the criminal law for their civilian populations, are entitled to considerable weight over and above the punishments Congress and the President consider appropriate in the military context. The more relevant federal benchmark is federal criminal law that applies to civilians, and that law does not permit the death penalty for child rape. Until the petition for rehearing, none of the briefs or submissions filed by the parties or the *amici* in this case cited or discussed the UCMJ provisions.

Statement of JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, respecting the denial of rehearing.

Respondent has moved for rehearing of this case because there has come to light a federal statute enacted in 2006 permitting the death sentence under the Uniform Code of Military Justice for rape of a minor. See Pub. L. 109–163, § 552(b)(1), 119 Stat. 3263. This provision was not cited by either party, nor by any of the numerous *amici* in the case; it was first brought to the Court's attention after the opinion had issued, in a letter signed by 85 Members of Congress. Respondent asserts that rehearing is justified because this statute calls into question the majority opinion's conclusion that there is a national consensus against capital punishment for rape of a child.

I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case. The majority opinion, after an unpersuasive attempt to show that a consensus against the penalty existed, in the end came down to this: "'[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Ante*, at 434. Of course the Constitution contemplates no such

thing; the proposed Eighth Amendment would have been laughed to scorn if it had read "no criminal penalty shall be imposed which the Supreme Court deems unacceptable." But that is what the majority opinion said, and there is no reason to believe that absence of a national consensus would provoke second thoughts.

While the new evidence of American opinion is ultimately irrelevant to the majority's decision, let there be no doubt that it utterly destroys the majority's claim to be discerning a national consensus and not just giving effect to the majority's own preference. As noted in the letter from Members of Congress, the bill providing the death penalty for child rape passed the Senate 95–0; it passed the House 374–41, with the votes of a majority of each State's delegation; and was signed by the President. JUSTICE KENNEDY's statement posits two reasons why this Act by Congress proves nothing about the national consensus regarding permissible penalties for child rape. First, it claims the statute merely "reclassif[ied]" the offense of child rape. *Ante*, at 947. But the law did more than that; it specifically *established* (as it would have to do) the penalty for the *new offense* of child rape—and that penalty was death: "For an offense under subsection (a) (rape) or subsection (b) (rape of a child), *death or such other punishment as a court-martial may direct.*" §552(b)(1), 119 Stat. 3263 (emphasis added). By separate executive order, the President later expressly reauthorized the death penalty as a punishment for child rape. Exec. Order No. 13447, 72 Fed. Reg. 56214 (2007). Based on these acts, there is infinitely more reason to think that Congress and the President made a judgment regarding the appropriateness of the death penalty for child rape than there is to think that the many *non*-enacting state legislatures upon which the majority relies did so—especially since it was widely believed that *Coker* took the capital-punishment option off the table. See *Coker* v. *Georgia*, 433 U. S. 584 (1977).

Second, JUSTICE KENNEDY speculates that the Eighth Amendment may permit subjecting a member of the military to a means of punishment that would be cruel and unusual if inflicted upon a civilian for the same crime. That is perhaps so where the fact of the malefactor's membership in the Armed Forces makes the offense more grievous. One can imagine, for example, a social judgment that treason by a military officer who has sworn to defend his country deserves the death penalty even though treason by a civilian does not. (That is not the social judgment our

society has made, see 18 U. S. C. § 2381, but one can imagine it.) It is difficult to imagine, however, how rape of a child could sometimes be deserving of death for a soldier but never for a civilian.

OCTOBER 3, 2008

Dismissal Under Rule 46

No. 07–811. MORRIS ET AL. *v.* CENTER FOR BIO-ETHICAL REFORM, INC., ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 477 F. 3d 807.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2005, 2006, AND 2007

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2005	**2006**	**2007**	**2005**	**2006**	**2007**	**2005**	**2006**	**2007**	**2005**	**2006**	**2007**
Number of cases on dockets	8	6	5	2,025	2,069	1,969	7,575	8,181	7,628	9,608	10,256	9,602
Number disposed of during term	4	1	1	1,679	1,714	1,624	6,526	7,180	6,749	8,209	8,895	8,374
Number remaining on dockets	4	5	4	346	355	345	1,049	1,001	879	1,399	1,361	1,228

	TERMS		
	2005	**2006**	**2007**
Cases argued during term	[1] 90	78	[2] 75
Number disposed of by full opinions	82	74	72
Number disposed of by per curiam opinions	5	4	2
Number set for reargument	3	0	0
Cases granted review this term	78	77	95
Cases reviewed and decided without oral argument	105	280	208
Total cases to be available for argument at outset of following term	31	28	47

[1] Includes three cases reargued 04–473, 04–1170, 04–1360.

[2] Includes 06–1275 which was argued on October 29, 2007, and dismissed on December 28, 2007.

JULY 7, 2008

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CONSTITUTIONAL LAW.

I. Confrontation of Witnesses.

Exceptions—Forfeiture by wrongdoing.—California Supreme Court's theory of forfeiture by wrongdoing is not an exception to Sixth Amendment's confrontation requirement because it was not an exception established at founding. Giles v. California, p. 353.

II. Cruel and Unusual Punishment.

Death penalty—Child rape.—Eighth Amendment's Cruel and Unusual Punishments Clause bars Louisiana from imposing death penalty for rape of a child where crime did not result, and was not intended to result, in victim's death. Kennedy v. Louisiana, p. 407.

III. Freedom of Speech.

Bipartisan Campaign Reform Act of 2002—Millionaire's Amendment.—BCRA §319(a)—which (a) increases contribution and expenditure limits of a candidate for House of Representatives when his opponent spends more than $350,000 in personal funds on campaign, and (b) requires a self-financing candidate to make certain disclosures—violates First Amendment. Davis v. Federal Election Comm'n, p. 724.

CONSTITUTIONAL LAW—Continued.

IV. Right to Bear Arms.

Ban on handgun possession.—Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within home; D. C. law at issue violates Second Amendment by making it impossible for citizens to use arms for core lawful purpose of self-defense. District of Columbia v. Heller, p. 570.

V. Right to Counsel.

Defendant's initial appearance—Initiation of criminal proceedings—Prosecutor's involvement.—A criminal defendant's initial appearance before a magistrate judge, where he learns charge against him and his liberty is subject to restriction, marks initiation of judicial proceedings that trigger attachment of Sixth Amendment right to counsel; such attachment does not require that a prosecutor be aware of that initial proceeding or involved in its conduct. Rothgery v. Gillespie County, p. 191.

VI. Right to Self-Representation.

Defendant's competence to conduct trial proceedings.—Constitution does not prohibit States from insisting upon representation by counsel for criminal defendants who are competent enough to stand trial but who suffer from severe mental illness to point where they are not competent to conduct trial proceedings by themselves. Indiana v. Edwards, p. 164.

CRIMINAL LAW. See **Constitutional Law,** I; II; V; VI; **Federal Courts.**

CROSS-APPEAL RULE. See **Federal Courts.**

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** II.

DEATH PENALTY. See **Constitutional Law,** II.

DISABILITY RETIREMENT BENEFITS. See **Age Discrimination in Employment Act of 1967,** 2.

DISCRIMINATION BASED ON AGE. See **Age Discrimination in Employment Act of 1967.**

DISCRIMINATION IN EMPLOYMENT. See **Age Discrimination in Employment Act of 1967.**

DISPARATE-IMPACT AGE DISCRIMINATION CLAIMS. See **Age Discrimination in Employment Act of 1967,** 1.

DISTRICT OF COLUMBIA. See **Constitutional Law,** IV.

EIGHTH AMENDMENT. See **Constitutional Law,** II.

ELECTION LAWS. See **Constitutional Law,** III.

ELECTRICITY RATES. See **Federal Power Act.**

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

Employee benefit plan—Abuse of discretion—Conflict of interest.—A company's dual role of evaluating an employee's claim for benefits from a plan covered by ERISA and paying those benefits out of its own pocket creates a conflict of interest that a reviewing court should consider as a factor in determining whether plan administrator has abused its discretion in denying benefits; factor's significance will depend on particular case's circumstances. Metropolitan Life Ins. Co. v. Glenn, p. 105.

EMPLOYER AND EMPLOYEES. See **Age Discrimination in Employment Act of 1967; Employee Retirement Income Security Act of 1974.**

EMPLOYMENT DISCRIMINATION. See **Age Discrimination in Employment Act of 1967.**

EXXON VALDEZ. See **Maritime Law.**

FEDERAL COURTS.

Courts of appeals—Power to increase defendant's sentence.—Absent a Government appeal or cross-appeal, Eighth Circuit could not, on its own initiative, order an increase in petitioner's sentence. Greenlaw v. United States, p. 237.

FEDERAL ENERGY REGULATORY COMMISSION. See **Federal Power Act.**

FEDERAL POWER ACT.

Electricity rate setting—Mobile-Sierra presumption.—In evaluating contracts at issue, Federal Energy Regulatory Commission had to apply *Mobile-Sierra* presumption, which requires FERC to presume that electricity rate set in a freely negotiated wholesale-energy contract is "just and reasonable," absent serious harm to public interest; standard for a buyer's rate-increase challenge is same as for a seller's challenge; FERC's analysis of instant rate challenge was flawed and incomplete, and its orders unclear. Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty., p. 527.

FEDERAL-STATE RELATIONS. See **Pre-emption.**

FIREARM POSSESSION BAN. See **Constitutional Law,** IV.

FIRST AMENDMENT. See **Constitutional Law,** III.

FLORIDA. See **Bankruptcy.**

FORFEITURE BY WRONGDOING. See **Constitutional Law,** I.

FREEDOM OF SPEECH. See **Constitutional Law,** III.

HABEAS CORPUS. See **Supreme Court.**

HANDGUN POSSESSION BAN. See **Constitutional Law,** IV.

ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996. See **Immigration.**

IMMIGRATION.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996—Removal—Voluntary departure motion.—An alien must be permitted an opportunity to withdraw a motion for voluntary departure from United States, provided request is made before expiration of departure period. Dada v. Mukasey, p. 1.

INDIANA. See **Constitutional Law,** VI.

JURISDICTION.

Tribal Court—Discrimination claim—Non-Indian land.—Tribal Court did not have jurisdiction to adjudicate a discrimination claim concerning a non-Indian bank's sale of reservation land that it owned in fee simple. Plains Commerce Bank v. Long Family Land & Cattle Co., p. 316.

KENTUCKY. See **Age Discrimination in Employment Act of 1967,** 2.

LAND SALES ON RESERVATIONS. See **Jurisdiction.**

LOUISIANA. See **Constitutional Law,** II.

MARITIME LAW.

Punitive damages—Exxon Valdez oil spill.—A $2.5 billion punitive damages award against Exxon for its oil spill off Alaska was excessive as a matter of maritime common law; respondents' award should be limited to an amount equal to compensatory damages, here, $507.5 million. Exxon Shipping Co. v. Baker, p. 471.

MILLIONAIRE'S AMENDMENT. See **Constitutional Law,** III.

NATIONAL LABOR RELATIONS ACT. See **Pre-emption.**

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PRE-EMPTION.

National Labor Relations Act—State law limiting union organizing.—California statutes prohibiting employers who receive state grants or specified state program funds from using those funds "to assist, promote, or deter union organizing" are pre-empted by NLRA. Chamber of Commerce of United States v. Brown, p. 60.

PUNITIVE DAMAGES. See **Maritime Law.**

RAPE OF CHILD. See **Constitutional Law,** II.

RATE SETTING. See **Federal Power Act.**

RESERVATION LAND. See **Jurisdiction.**

RETIREMENT BENEFITS. See **Age Discrimination in Employment Act of 1967,** 2.

RIGHT TO BEAR ARMS. See **Constitutional Law,** IV.

RIGHT TO COUNSEL. See **Constitutional Law,** V.

RIGHT TO SELF-REPRESENTATION. See **Constitutional Law,** VI.

SECOND AMENDMENT. See **Constitutional Law,** IV.

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SIXTH AMENDMENT. See **Constitutional Law,** I; V; VI.

STAMP TAXES. See **Bankruptcy.**

STANDING.

Assignee with legal claim for money owed—Promise to remit to assignor.—An assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when assignee has promised to remit litigation proceeds to assignor. Sprint Communications Co. v. APCC Services, Inc., p. 269.

STAYS. See **Supreme Court.**

SUPREME COURT.

1. Term statistics, p. 951.

2. *Recall of mandate—Stays—Habeas corpus.*—Petitioner's application to recall and stay mandate in *Medellín* v. *Texas*, 552 U. S. 491, application for stay of execution, and petition for writ of habeas corpus are denied. Medellín v. Texas, p. 759.

TRIBAL JURISDICTION. See **Jurisdiction.**

UNION ORGANIZING. See **Pre-emption.**

UTILITY RATES. See **Federal Power Act.**

WHOLESALE ENERGY RATES. See **Federal Power Act.**

WITNESSES. See **Constitutional Law,** I.